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**Shared Responsibility in International Law:  
A Concept Paper**

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# Shared Responsibility in International Law: A Concept Paper

André Nollkaemper & Dov Jacobs<sup>1</sup>

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## 1. Introduction

This paper explores the phenomenon of the sharing of international responsibilities among multiple actors who contribute to injury to third parties. It examines the manifestations of shared responsibility, identifies the normative questions that it raises, assesses its possible consequences for international law and legal doctrine and sets forth a conceptual framework that allows us to analyse questions of shared responsibility. By doing so, the paper lays out the foundations, scope and ambitions of the SHARES Project - a five-year research project funded by the European Research Council and carried out by a research group at the Amsterdam Center for International Law.<sup>2</sup>

A study of shared responsibility is timely and important. As states and other actors engage in an increasing number of cooperative efforts, the likelihood of injury resulting from cooperative or joint action will multiply. Injured parties will then be faced with a plurality of wrongdoing states and/or other actors.

Questions of shared responsibility may arise in a wide diversity of situations. Consider the following examples:

If states do not meet agreed obligations to cut emissions to prevent climate change, and human displacement and environmental harm occurs, the question may arise which states are responsible.<sup>3</sup>

If states or international organizations fail to live up to the collective ‘responsibility to protect’ human populations from mass atrocities,<sup>4</sup> a responsibility that rests in part on multilateral obligations, binding on a plurality of states, or organizations, at the same

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<sup>2</sup> More information at: <http://www.sharesproject.nl>

<sup>3</sup> The question is not entirely hypothetical, as thought has been given to the possibility of claims that vulnerable states or populations may make against states that would be responsible for (part of) the problem. M Faure and A Nollkaemper, ‘International Liability as an Instrument to Prevent and Compensate for Climate Change’ (2007) 43 *Stanford Journal of International Law* 124.

<sup>4</sup> *Implementing the Responsibility to Protect*, Report of the Secretary-General (12 January 2009) UN Doc A/63/677 available at [www.responsibilitytoprotect.org/index.php/featured\\_reports/2105](http://www.responsibilitytoprotect.org/index.php/featured_reports/2105).

time,<sup>5</sup> the question may arise of who is responsible for the failure to act.<sup>6</sup>

Questions of shared responsibility may also arise if two or more states or international organizations carry out a joint military operation in a foreign country, and soldiers of one of these states, or the international organization, violate international humanitarian law.<sup>7</sup> It is also relevant to situations where states, and/or international organizations, carry out peace operations in third states.

If states agree to cooperate, whether or not through international institutions, to conserve fish stocks beyond the Exclusive Economic Zone (EEZ), the question may arise who will be responsible for a failure to achieve this objective and whether and how responsibility between the wrongdoing states is distributed.<sup>8</sup>

If two states exercise joint FRONTEX missions to control the external borders of the EU, and the rights of persons seeking asylum are violated, the question will arise whether the EU, and/or one or both of the states are responsible and, if so, how responsibility is shared among them.<sup>9</sup>

And, as a final example, if two or more states agree to allocate tasks for hosting refugees and one of them does not live up to its obligations, the question may arise whether only that latter state, or both states are responsible. This question is further

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<sup>5</sup> A J Vetlesen, 'Genocide: A Case for the Responsibility of the Bystander' *Bystander* (2000) 37(4) *Journal of Peace Research* 519, 529; M Hakimi, 'State Bystander Responsibility' (2010) 21 *European Journal of International Law* 341.

<sup>6</sup> This question was considered in some form by the ICJ in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43.

<sup>7</sup> This question was raised after the invasion by the US and the UK in Iraq in 2003; see eg C Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control' in P Shiner and A Williams (ed), *The Iraq War and International Law* (Hart Publishing, 2008). For a notable example of a joint operation by two international organizations, see the African Union and United Nations mission in Darfur: S E Kreps, 'The United Nations-African Union Mission in Darfur: Implications and prospects for success' (2007) 16(4) *African Security Review*, 65.

<sup>8</sup> See for instance: The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269.

<sup>9</sup> M den Heijer, 'Europe Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers, 2010), p 169; and E Papastavidris, 'Fortress Europe and FRONTEX: Within or Without International Law?' (2010) 79 *Nordic Journal of International Law* 75.

complicated if the role of UNHCR in the determination of refugee status in states that are not able to do so is considered.<sup>10</sup>

The aforementioned situations suffice to illustrate the fact that questions of shared responsibility are critical to many issue-areas in modern international law.

The increase in situations of shared responsibility raises fundamental normative questions. For example, on the basis of what criteria (justice, equity, effectiveness, power, etc.) is responsibility between multiple actors to be apportioned? Is the fact that a state or organization at one point in time was not able to prevent, say, an act of genocide, enough to absolve it from responsibility, or can we base responsibility on the failure of that actor to ensure that it had the necessary capabilities?<sup>11</sup>

The pervasiveness of situations of shared responsibility also raises questions of positive law and legal doctrine. The principles of international law on the basis of which responsibility between multiple wrongdoing actors should be allocated are, in the words of Brownlie, ‘indistinct’<sup>12</sup> and do not provide clear answers. There is still much truth to the observation that Noyes and Smith made in 1988: ‘The law of multiple state responsibility is undeveloped. The scholarly literature is surprisingly devoid of reference to the circumstances or consequences of multiple state responsibility. Judicial or arbitral decisions addressing a state's assertions that other states share responsibility are essentially unknown’.<sup>13</sup> While the latter statement is not entirely correct in light of judicial developments in this field,<sup>14</sup> it is certainly true that due to jurisdictional limitations and undeveloped principles of shared responsibility,

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<sup>10</sup> Council Regulation (EC) No 343/2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (18 February 2003) OJ L-50/1, 25.2.2003 (‘Dublin Regulation’); A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009); M Zieck, ‘Doomed to Fail from the Outset? UNHCR’s Convention Plus Initiative Revisited’ (2009) 21(3) *International Journal of Refugee Law* 387, 392.

<sup>11</sup> J M Welsh, ‘The Responsibility to Protect and Humanitarian Intervention’ in J Hoffman and A Nollkaemper (eds), *The Responsibility to Protect: From Practice to Principle* (Amsterdam University Press 2011, forthcoming).

<sup>12</sup> I Brownlie, *Principles of Public International Law*, 7th edn (Oxford University Press, 2008) 457; See also R P Alford, ‘Apportioning Responsibility Among Joint Tortfeasors for International Law Violations’ (2011) 38(2) *Pepperdine Law Review* 233, 240: ‘[T]here is insufficient guidance under international law with respect to questions of apportioning responsibility’.

<sup>13</sup> J E Noyes and B D Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 (2) *Yale Journal of International Law* 225.

<sup>14</sup> *Infra*, section 2.

the contribution of the case-law that does exist is rather limited. In legal scholarship, we find useful contributions that may help us identify the conceptual tools and the perspectives for reaching satisfactory solutions in regard to situations where two or more states or other actors collectively are involved in an act or omission causing injury to third parties. However, building on these contributions, it still remains to formulate a comprehensive conceptual framework within which to better understand the phenomenon of shared responsibility.

The questions that need to be answered multiply if we consider that it is not only states and international organizations that can be involved in situations of shared responsibility, but that a variety of other actors can contribute to damage to third parties. In the examples of climate change and atrocities committed during armed conflicts, the role of non-state actors will have to be considered when we reflect on principles and procedures applying to shared responsibility. Indeed, situations of shared responsibility often bring into play the responsibility of individuals, the analysis of which, in relation to the responsibility of other actors, is essential to comprehensively understand the issue.

As the variety and frequency of cooperative endeavors between states and other actors expands, there is a need for new perspectives that allow us to understand how the international legal order deals and could deal with shared responsibilities. Such new perspectives might eventually help to develop international principles and processes that are suited to address such situations.

In attempting to formulate such new perspectives, we have to cover a vast terrain. This has to include the design of primary rules that define the respective obligations of states and other actors in case of concerted action. It also has to cover the content and implementation of secondary obligations: how can principles of responsibility for wrongdoing be (re)formulated in the light of shared responsibility? It furthermore cannot neglect the procedural law of international courts and tribunals, where eventually claims arising out of shared responsibility may be played out and which, at least in some cases, are ill-suited to deal with claims that transcend a bilateralist framework. And finally, we have to consider the wide variety of practices by which actors are to be held to account for their involvement in collective wrongdoing, which

for one reason or another cannot be qualified in terms of formal international responsibility. Addressing shared responsibility requires that these problems be considered in their interrelationship, rather than in isolation.

This paper surveys the terrain of what is one of the core research questions of the issue of shared responsibility : the allocation of responsibility and liability among several states and international organizations.<sup>15</sup> It identifies what international law has to offer for situations of shared responsibility and what is lacking, and provides the building blocks for a new perspective that may be better able to grasp the legal complexities arising out of such situations.

As will become apparent, our methodology is dialectical, adopting both a holistic and pluralist approach to international responsibility. It is holistic in the sense that it suggests to not necessarily abide by the primary/secondary dichotomy that often structures debates on international responsibility. On the contrary, any discussion of responsibility must take into account both the nature of the obligation and the regime of responsibility that applies to its violation. However, we also adopt a pluralist approach, considering, in light of the public and private dimensions of international responsibility, that a unitary approach to the issue should be replaced with a differentiated approach where the plurality in the nature of obligations and the diversity of objectives of international responsibility justify the existence of a number of regimes of responsibility that will be better able to address this plurality.

In order to achieve this, we will first present the content and limits of the current framework of State Responsibility in dealing with situations of shared responsibility (section 2). Section 3 will then contextualize the need for developing principles of shared responsibility by, first, identifying relevant fundamental changes in the international legal order and, second, revisiting the foundations of the law of state responsibility better adapted to the needs of addressing shared responsibility. Section 4 discusses the principles and processes of shared responsibility. Finally, in section 5,

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<sup>15</sup> This paper focuses mostly on states, but it is acknowledged that the multi-layered nature of international organizations may pose additional challenges for the law of international responsibility to which the general rules of state responsibility are not *mutatis mutandis* applicable. The further investigation of these challenges particular to the responsibility of international organizations and their member states is part of the SHARES research agenda, and relevant results will be presented at a later stage.

in light of the discussions in preceding sections, we will propose a typology of research categories that will be addressed in the project and that provide a starting point to develop a system of international responsibility that is better capable to address the questions of shared responsibility.

## **2. Overarching Principles of International Law Relevant to Shared Responsibility**

Questions of shared responsibility are not new to international law. The ICJ has considered aspects of shared responsibility in several cases. For instance, in the *Corfu Channel* case, the ICJ adjudicated a claim against Albania for its failure to warn the United Kingdom of the presence of mines, in a situation in which it was alleged that Yugoslavia had at least contributed to the injury suffered by the United Kingdom as it actually had laid the mines in the Albanian waters.<sup>16</sup> Also the *Certain Phosphate Lands in Nauru* case,<sup>17</sup> the *East Timor* case<sup>18</sup> and the *Legality of the Use of Force* cases<sup>19</sup> involved multiple responsible parties.<sup>20</sup>

The ECtHR has likewise also addressed questions of shared responsibility. In 2004, for example, the ECtHR had to deal with the issue of how *de facto* control by one state and *de jure* control by another over a territory affected the distribution of responsibility between Russia and Moldova over the autonomous region of Transdniestria (*Ilaşcu*).<sup>21</sup> The Court found that both states could, on different grounds, be held responsible and thus in effect found that responsibility was a shared one. In 2011, it had to consider the responsibility of two states (Belgium and Greece) in

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<sup>16</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, Judgment, I.C.J. Reports 1949, p. 4.

<sup>17</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240.

<sup>18</sup> *East Timor (Portugal v Australia)*, Judgment, I. C.J. Reports 1995, p. 90

<sup>19</sup> *Legality of the Use of Force (Yugoslavia v United States of America)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 916.

<sup>20</sup> A Nollkaemper, 'Issues of Shared Responsibility Before the International Court of Justice' (April 2011), .ACILSchool Research Paper (SHARES Series) No. 2011-01 (available at [www.sharesproject.nl/publication/issues-of-shared-responsibility-before-the-international-court-of-justice/](http://www.sharesproject.nl/publication/issues-of-shared-responsibility-before-the-international-court-of-justice/)).

<sup>21</sup> *Ilaşcu and Others v Moldova and Russia* [GC] no. 48787/99, ECHR 2004-VII.

relation to the treatment of refugees (*MSS*).<sup>22</sup> It found that both Greece (for mistreating an asylum seeker) and Belgium (for sending the asylum seeker in question back to Greece with the knowledge of potential mistreatment) were responsible.

Other international tribunals that were faced with questions of shared responsibility include the Arbitral Tribunal in the *Eurotunnel* dispute, that found France and the UK jointly responsible for failure to prevent the entry of asylum seekers in the Channel Tunnel,<sup>23</sup> and the International Seabed Authority, that affirmed the possibility of joint responsibility between states that both sponsor an entity that engages in the exploration or exploitation of the deep-seabed.<sup>24</sup>

In part based on this case-law, the ILC has considered some aspects of shared responsibility and the ILC Articles on the Responsibility of States<sup>25</sup> and International Organisations<sup>26</sup> contain relevant principles; for instance the principle of ‘complicity’<sup>27</sup> and the principle that if two states cause injury, each state is responsible for its own wrong.<sup>28</sup>

Based on the work of the ILC<sup>29</sup> and the (limited) international case-law, in this section we first identify the main features of the dominant legal framework (2.1) and then identify how these could be relevant for situations of shared responsibility (2.2).

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<sup>22</sup> *M.S.S. v Belgium and Greece* [GC] no. 30696/09, ECHR 2011.

<sup>23</sup> Eurotunnel Arbitration (*The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France*) Partial Award 2007, par 165-69.

<sup>24</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, No. 17, ITLOS, 1 February 2011.

<sup>25</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001).

<sup>26</sup> ILC Draft Articles on Responsibility of International Organizations, UN Doc A/CN.4/L.778 (2011).

<sup>27</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), art 16; ILC Draft Articles on Responsibility of International Organizations, UN Doc A/CN.4/L.778 (2011), art 14.

<sup>28</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), art 47; ILC Draft Articles on Responsibility of International Organizations, UN Doc A/CN.4/L.778 (2011), art 48.

<sup>29</sup> For reasons of brevity, this section will rely heavily on the articles on State Responsibility. This however should not be read as an exclusion of the issue of the responsibility of international organizations in relation to third states, in application of the Draft Articles on the Responsibility of International Organizations which generally follow the same logic. Moreover, this paper will not address the specific question of the relationship of an international organization with its members in application of the internal rules of the organization. C Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’ ACIL Research Paper No 2011-03 (SHARES Series), 26 April 2011.

## 2.1. The principle of independent and exclusive responsibility

### 2.1.1. The dominant role of the principle of independent responsibility

The dominant approach of international law to the allocation of international responsibility is based on the notion of ‘individual’ or ‘independent’ responsibility of states and international organizations.<sup>30</sup> Under the principle of independent responsibility, the state, or international organization, as the case may be, is solely responsible for its own conduct and its own wrongs, that is, the conduct that is attributable to it and which is deemed in breach of its obligations.<sup>31</sup>

In this dominant approach, international responsibility of a state or organization in principle is independent from that of other actors and, moreover, is exclusive, in that an act generally is only attributed to one actor at a time.<sup>32</sup> The commentary to the ILC Articles stresses the exceptional nature of questions of sharing, and emphasizes that in principle the determination of wrongful acts and their attribution is made on an individual basis and that attribution is an exclusive operation.<sup>33</sup>

Illustrative thereof is the treatment of acts of organs of a state that are put at the disposal of another state. Roberto Ago, in this Third Report,<sup>34</sup> recognized that ‘it may be that if another State is given an opportunity to use the services of such an organ, its demands may not be so exacting as to prevent the organ from continuing to act

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<sup>30</sup> To prevent confusion with ‘individual responsibility’ as a term that refers to responsibility of individuals under international criminal law, in the remainder of this paper we use the term ‘independent responsibility’.

<sup>31</sup> Report of the International Law Commission on the work of its fifty-third session (Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries), UN Doc A/56/10 (2001), commentary to art 47, par 8.

<sup>32</sup> See eg *HN v Netherlands* (Ministry of Defence and Ministry of Foreign Affairs), First instance judgment of 10 December 2008, District Court of the Hague, ILDC 1092 (NL 2008), par 47-49. However, the Court of Appeal departed from this holding, and found that one act could both be attributed to the Netherlands and the UN. See: *Nuhanović v Netherlands*, Gerechtshof, 5 July 2011, LJN BR 0133; and A Nollkaemper, ‘Dual attribution: liability of the Netherlands for removal of individuals from the compound of Dutchbat’, 8 July 2011, SHARES Research Project on shared responsibility in international law, at: [www.sharesproject.nl/dual-attribution-liability-of-the-netherlands-for-removal-of-individuals-from-the-compound-of-dutchbat/](http://www.sharesproject.nl/dual-attribution-liability-of-the-netherlands-for-removal-of-individuals-from-the-compound-of-dutchbat/), last visited: 13 July 2011.

<sup>33</sup> Report of the International Law Commission on the work of its sixty-first session (Draft Articles on the Responsibility of International Organizations, with commentaries), UN Doc A/64/10 (2009), commentary to art 6.

<sup>34</sup> ILC Special Rapporteur Mr. Roberto Ago, *Third Report on State Responsibility*, 23<sup>rd</sup> session (1971) UN Doc A/CN.4/246 and Add.1-3 (F) (in Ybk, 1971 vol II(1) (F)) par 201.

simultaneously, though independently, as an organ of its own State'.<sup>35</sup> However, he appeared to exclude the possibility that an act of such an organ would be attributed to the two states concerned. He noted that in such cases it will be necessary 'to ascertain in *each particular instance on whose behalf and by whose authority a specific act or omission has been committed*'.<sup>36</sup> He also recognized that it may be that a state at whose disposal a foreign state has placed a person belonging to its administration will appoint this person to a post in its service, 'so that at a given moment he will formally be an organ of two different States at the same time.'<sup>37</sup> However, also in such a situation, 'the person in question will in fact be acting *only for one* of the two States or at all events in different conditions for each of them'.<sup>38</sup> According to that view, the defining criterion of 'genuine and exclusive authority'<sup>39</sup> by definition only can be fulfilled for one state at a time.<sup>40</sup>

Another illustration of the paradigm of independent responsibility is the nature of the responsibility of a state based on directing or controlling another state<sup>41</sup>. In such cases, the question may arise of whether the directing state is solely responsible, or whether this responsibility is shared with the dependent state. Dominicé answers the question in the former way: it is only the controlling state that is responsible, 'for it is either that the state is responsible for the act of another carried out under its direction or control, or the dependent state maintains a certain degree of freedom, in which case it is responsible for its own conduct'.<sup>42</sup> He adds that in the latter case, 'the dominant state may have incited the conduct, but mere incitement is not unlawful'.<sup>43</sup> Likewise, in the case of coercion, only the coercing state would be responsible,<sup>44</sup> even though it

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid (emphasis added).

<sup>37</sup> Ibid.

<sup>38</sup> Ibid (emphasis added).

<sup>39</sup> Ibid par 202 and 206.

<sup>40</sup> see also ILC Special Rapporteur Mr. Roberto Ago, *Fourth Report on State Responsibility*, 24<sup>rd</sup> session (1972) UN Doc A/CN.4/264 and Add.1 (in Ybk, 1972 vol II), 147 (If, on the other hand, as we pointed out, the persons concerned, although acting in the territory of another State, are still under the orders and exclusive authority of their own State or of the organization to which they belong, any acts or omissions by them are, and remain, acts of that State or organization. In no circumstances can they be attributed to the territorial State or involve its international responsibility).

<sup>41</sup> See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), art. 18.

<sup>42</sup> C Dominicé, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State in The Law of International Responsibility' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 284, 288.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid at 289

may well be argued that even a coerced state has a degree of freedom that would justify the consideration of its international responsibility.<sup>45</sup>

Also in the relatively scarce case-law, international courts have based themselves on the principle of independent responsibility. The ICJ focused on independent wrongdoing in the *Corfu Channel*<sup>46</sup> and in the *Certain Phosphate Lands in Nauru*<sup>47</sup> cases. Likewise, the ECtHR considered in *M.S.S. v. Belgium and Greece* the responsibility of Belgium and Greece independently.<sup>48</sup> The Tribunal in the *Eurotunnel* case also preferred to approach international responsibility for common conduct through the lens of independent responsibility, and based solutions to wrongs committed by concerted action on the primary rules in question.<sup>49</sup>

In line with these approaches, the ILC in its Articles on the Responsibility of States<sup>50</sup> drafted its principles on attribution in terms of independent attribution which, by the logic of Articles 1 and 2, would result in independent responsibility.<sup>51</sup> To some extent this is also true for the draft Articles on the Responsibility of International Organizations, although these do more openly recognize the possibility that the responsibility of an organization does not exclude responsibility of one or more member states<sup>52</sup> and vice versa.,<sup>53</sup> Neither do they exclude the responsibility of any international organization that the international organization might be a member of.<sup>54</sup>

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<sup>45</sup> J D Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007) 40(3) *Vanderbilt Journal of Transnational Law* 611, 639.

<sup>46</sup> *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, Judgment, I.C.J. Reports 1949, p. 4.

<sup>47</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240.

<sup>48</sup> *M.S.S. v Belgium and Greece* [GC] no. 30696/09, ECHR 2011.

<sup>49</sup> *Eurotunnel Arbitration (The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France)* Partial Award 2007. par 187.

<sup>50</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001).

<sup>51</sup> But see Report of the International Law Commission on the work of its fifty-third session (Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries), UN Doc A/56/10 (2001), commentary to art 17, par 9 (stating that the directed state can also be responsible, since the mere fact that it was directed to carry out an internationally wrongful act does not constitute a circumstance precluding wrongfulness). Also note that Article 47 does recognize the possibility of multiple wrongdoers, see *infra* section 2.2.

<sup>52</sup> ILC Draft Articles on the Responsibility of International Organizations, UN Doc A/CN.4/L.778 (2011), Articles 58-62.

<sup>53</sup> *Ibid*, Article 63.

<sup>54</sup> *Ibid*, Article 18.

### 2.1.2. Factors that explain the dominance of the principle

Two factors in particular can be advanced to explain the dominance of the principle of independent responsibility. Perhaps the main explanatory factor, specifically applied to states, is the principle of sovereignty, defined in terms of independence and liberty from other states.<sup>55</sup> Sovereignty implies that a state is not responsible for the acts of another state. Just as in international criminal law where the principle of individual autonomy resists the responsibility of individuals for acts that they themselves did not commit, it is normatively problematic to hold a state responsible, with all the possible consequences that may result from such responsibility in terms of reparation, for a conduct that is not its own.

An illustration of this reticence in holding a state responsible for acts it did not commit can be found in the high threshold for attribution of acts by private persons to states. As the ICJ explained in the *Genocide case*:

the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf...[T]he overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.<sup>56</sup>

Just as a state would not want to be held responsible for acts of private persons that it did not effectively control, it would not want to be held responsible for acts of other states on the basis of a loose involvement with those other states.

The second main explanatory factor, which is linked to the principle of sovereignty, is the bilateralist nature of the procedural principles of invocation of responsibility and of dispute settlement. In the ICJ, this bilateralist structure of dispute settlement limits

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<sup>55</sup> At this stage of the paper, we use a traditional approach to ‘sovereignty’ as an historical paradigm and for descriptive purposes.

<sup>56</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43, par 406

the possibility that the Court exercises jurisdiction over multiple responsible states.<sup>57</sup> This limits both the possibility of findings in individual instances of shared responsibility, as well as the possibility that the Court contributes to the development of the principles applicable in such situations. Arguably, there is an increase in participation by third parties before international tribunals, for example at the ICJ,<sup>58</sup> however, it should be pointed out that these rights are developing in relation to applicants before these tribunals, rather than the defendants which are at the core of the discussions on shared responsibility. One should also note that the situation is not universally the same among all international courts. As the case-law of the ECHR demonstrates, the compulsory jurisdiction of the Court has allowed a larger number of multi-defendant cases to be dealt with.

This bilateralist procedural set-up may be contrasted with international criminal law. On the one hand, the international criminal tribunals have been endowed with powers to bring individuals before them irrespective of their individual consent, bypassing the structural limits of interstate bilateral litigation. On the other hand, these tribunals have developed such concepts as joint criminal enterprise, thus allowing individuals to be held responsible for acts with which they were, in some cases at least, only loosely associated,<sup>59</sup> and have been given powers to join related cases.<sup>60</sup> The fundamentally different position of courts and tribunals with jurisdiction over states has both impeded the possibility to hold multiple actors responsible, in single proceedings or a series of related proceedings, and has hampered their ability to develop international law into a direction where it would be better capable of dealing with questions of shared responsibility.

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<sup>57</sup> Under art 36 of the Statute, the Court's jurisdiction is limited to states that have consented to the exercise of jurisdiction. Under art 62 of the Statute, a state that considers that it has an interest of a legal nature which may be affected by the decision in the case, may submit a request to the Court to be permitted to intervene. However, the Court has no power to order such a state to participate in proceedings. See eg Jurisdictional Immunities of the State (*Germany v Italy*), Application by the Hellenic Republic for Permission to Intervene, Order of 4 July 2011, I.C.J. General List No. 143.

<sup>58</sup> G Hernandez, 'Non-State Actors from the Perspective of the International Court of Justice', in J d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 140.

<sup>59</sup> See eg H van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations' (2007) 5 *Journal of International Criminal Justice* 91.

<sup>60</sup> Rules of Procedure and Evidence, IT/32/Rev. 45, 8 December 2010, Rule 48; Rome Statute of the International Criminal Court, (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 (Rome Statute) Art 64 (5).

As a result, the principle of independent and exclusive responsibility is firmly entrenched in the law of international responsibility and the procedural law of institutions that may be charged with their implementation. A key normative problem of shared responsibility is how the underlying considerations should be balanced with potentially opposing normative considerations, especially those related to the position of injured parties – a matter to which we turn to in section 4 below.

### 2.1.3. How independent (and exclusive) responsibility may be relevant to shared responsibility

While, as is explained in the next section, the ILC framework has obvious shortcomings in situations of shared responsibility, it is not entirely powerless in relation to such situations. Even if the law of responsibility has a strong presumption that responsibility for any single act is independent and exclusive, this principle can nonetheless accommodate some situations of shared responsibility.

First, in certain cases, cooperative action may be ‘debundled’ in individual acts or omissions. The principle of individual responsibility may then be adequate for dealing with cooperative action. Thus, in the *East Timor case*, where a treaty between Indonesia and Australia allegedly violated the right to self-determination of the people of East Timor, the ICJ noted that ‘even if the responsibility of Indonesia is the prime source, from which Australia’s responsibility derives as a consequence, Australia cannot divert responsibility from itself by pointing to that primary responsibility’.<sup>61</sup> Australia’s own role in regard to the treaty was therefore sufficient for its (independent) responsibility. And in respect of a situation where two states set up a common organ (for instance the Coalition Provisional Authority set up by the UK and the USA during the occupation of Iraq), the ILC took the position that ‘the conduct of the common organ cannot be considered otherwise than as an act of each of the states whose common organ it is. If that conduct is not in conformity with an international

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<sup>61</sup> *East Timor (Portugal v Australia)*, Dissenting Opinion Judge Weeramantry, I. C.J. Reports 1995, p. 139, 172, par iii.

obligation, then two or more states will concurrently have committed separate, although identical, internationally wrongful acts.’<sup>62</sup>

Linked to the previous finding, the principle of individual responsibility can have the added benefit of making it less likely that proceedings will be dismissed because a potential party is not involved in the proceedings, within the limits of the *Monetary Gold* principle.<sup>63</sup>

Second, the ILC did recognize that two separate acts, attributable to different actors, can result in a single injury. The responsibility of one state, or international organization, does not exclude the responsibility of another state or organization in relation to a particular instance where damage is caused to another actor.<sup>64</sup>

Following this logic, the ILC did include in its Articles on State Responsibility an article providing that if two states are responsible for the same wrongful act, each state can be held responsible.<sup>65</sup> While this article is generally interpreted as providing a basis for independent responsibility, the possibility of parallel or concurrent independent wrongs makes it directly relevant to questions of shared responsibility.

In sum, there is indeed some room in the current framework to implement shared responsibility. However, the power of the principle of independent responsibility to address questions of responsibility that arise in cases where there is a multiplicity of wrongdoing actors is in several aspects limited, as will now be discussed.

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<sup>62</sup> Report of the International Law Commission on the work of its forty-eight session (Draft articles on state responsibility with commentaries thereto adopted by the International Law Commission on first reading) UN Doc A/51/10 (1996): par 2 of the commentary to art 27.

<sup>63</sup> *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 19. In this case, the Court formulated an exception to the principle that the absence of a state who is concurrently or jointly responsible for a wrongful act does not preclude the exercise of jurisdiction.

<sup>64</sup> See eg ILC Draft Articles on Responsibility of International Organizations/Organisations, UN Doc A/CN.4/L.778 (2011), art 19 (stipulating that 'This Chapter is without prejudice to the international responsibility of the State or international organization which commits the act in question, or of any other State or international organization.').

<sup>65</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), art. 47; ILC Draft Articles on Responsibility of International Organizations/Organisations, UN Doc A/CN.4/L.778 (2011), art 48.

## 2.2. The Limitations of Individual Responsibility

Reducing complex relationships to a responsibility of an individual state without regard to the position of other states involved is, for a number of reasons, unlikely to result in a satisfactory outcome.

For one thing, the basis of a determination of a plurality of wrongdoing acts remains in many respects unclear. While the responsibility for acts of common organs and for parallel wrongdoing appear relatively settled, this cannot be said for many aspects of the responsibility of multiple actors arising out of aid and assistance,<sup>66</sup> direction and control,<sup>67</sup> and the responsibility of both international organizations<sup>68</sup> and their member states.<sup>69</sup>

Moreover, the principle of individual responsibility in itself provides no basis for the task of apportioning responsibilities between multiple wrongdoing actors, who have breached, for instance, the obligation to cooperate to conserve shared fish stocks, the responsibility to protect populations from genocide or crimes against humanity, or the obligation to cooperate to bring to an end situations arising from a serious breach of a peremptory norm of international law.<sup>70</sup> In such cases, it may be necessary to apportion responsibility or the resulting obligation to provide reparation between the entities involved.<sup>71</sup> The principle of independent responsibility in itself provides no basis for this task. Article 47 deals in some way with this issue. However, although this Article is a welcome acknowledgement of situations of multiple wrongdoers, it raises, in its current formulation, as many questions as it answers. The ILC has declined to express a clear opinion on whether their responsibility is joint, or joint and

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<sup>66</sup> H Aust, *Complicity and the Law of State Responsibility* (Cambridge Studies in International and Comparative Law) (Cambridge University Press, 2011, forthcoming).

<sup>67</sup> J D Fry, 'Coercion, Causation, and the Fictional Elements of Indirect State Responsibility' (2007) 40(3) *Vanderbilt Journal of Transnational Law* 611, 639.

<sup>68</sup> M Hirsch, *The Responsibility of International Organizations Toward Third Parties; Some Basic Principles* (Dordrecht, Martinus Nijhoff Publishers, 1995).

<sup>69</sup> ILC Draft Articles on Responsibility of International Organizations, UN Doc A/CN.4/L.778 (2011), Articles 58-62.

<sup>70</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), art 41.

<sup>71</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion of Judge Simma, I.C.J. Reports 2003, p. 324.

several, and it provided few answers as to whether and how any responsibility between multiple responsible parties should be allocated.

In combination with, and partly as a result of, the procedural limitations of dispute settlement, the conceptual tools of exclusive individual responsibility of states have led courts to reduce complex cooperative schemes to binary categories, without resulting in principled discussions of the shared nature of responsibility.<sup>72</sup> A noteworthy example is the decision of the European Court of Human Rights in *Behrami*. The Court allocated all acts and omissions in regard to a failure of demining operations in Kosovo exclusively to the UN, not the Member States, without considering the possibility of a less black and white solution in which responsibility would be shared.<sup>73</sup>

As a consequence, the absence of proper criteria for allocating responsibility may either result in too little or too much responsibility for any individual state or other actor.

Too little responsibility, because impossibility to determine with sufficient certainty which of the states involved was responsible for which wrongdoing may effectively prevent a finding of responsibility. An example of this phenomenon was the *Saddam Hussein* case before the European Court of Human Rights. Saddam Hussein brought a case against 21 states that allegedly were implicated in the invasion of Iraq and his capture. The Court held that as long as the applicant could not identify the specific wrongful acts of the member states, no responsibility of any member state in connection with the invasion of Iraq and/or the detention of Hussein could be found.<sup>74</sup>

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<sup>72</sup> Corfu Channel (*United Kingdom of Great Britain and Northern Ireland v Albania*), Judgment, I.C.J. Reports 1949, p. 4; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Judgment, I.C.J. Reports 1986, p. 14; Certain Phosphate Lands in Nauru (*Nauru v Australia*), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240; East Timor (*Portugal v Australia*), Judgment, I. C.J. Reports 1995, p. 90; and Legality of Use of Force (*Serbia and Montenegro v United Kingdom*), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 826.

<sup>73</sup> *Behrami and Behrami v France; Saramati v France, Germany and Norway* (dec) [GC], no. 71412/01 and no. 78166/01, ECHR 2007.

<sup>74</sup> *Hussein v Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom* (dec), no. 23276/04, ECHR 2006.

Moreover, the involvement of a multiplicity of actors in cases of concerted action may lead to blame-shifting games (or ‘buck-passing’) between the various actors that are involved.<sup>75</sup> In the Srebrenica cases, implicating both acts and omissions of the United Nations and of the Netherlands in regard to the protection of the safe haven of Srebrenica in 1995, both the UN and the Netherlands denied responsibility and effectively passed the “buck” to each other.<sup>76</sup>

In effect, a multiplicity of actors may, also at the international level, lead to the following paradox of shared responsibility: ‘as the responsibility for any given instance of conduct is scattered among more people, the discrete responsibility of every individual diminishes proportionately.’<sup>77</sup>

Too much responsibility, because as responsibility cannot easily be apportioned, the result can be that a state is to shoulder the entire blame. Judge Ago noted in his dissenting opinion in the *Nauru* case that given the fact that the wrong to Nauru involved concerted action between Australia, New Zealand and the United Kingdom, it would be on ‘an extremely questionable basis’ if the Court were to hold that Australia was to shoulder in full the responsibility in question.<sup>78</sup>

As a consequence, the principle of individual responsibility and the accompanying procedures may undermine what can be considered key main functions of responsibility, in particular the restoration of legality (if states can effectively shift blame to other states, none will be required to change its conduct) and the protection of the rights of injured parties (who may not be able to bring successful claims against all responsible parties).<sup>79</sup>

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<sup>75</sup> See generally C Hood, ‘The Risk Game and the Blame Game’, (2002) 31(1) *Government and Opposition* 15.

<sup>76</sup> A Nollkaemper, ‘Multilevel accountability in international law: a case study of the aftermath of Srebrenica’ in Y Shany and T Broude (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity* (Hart Publishing, 2008).

<sup>77</sup> M Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge University Press, 1998), 46.

<sup>78</sup> *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Dissenting Opinion Judge Ago, I.C.J. Reports 1992, p. 326.

<sup>79</sup> The functions of responsibility are of course open to discussion. This will be discussed in more detail in section 3, especially in light of the public and private dimensions of international responsibility.

### 2.3. Tentative yet unsatisfactory solutions

One possible way to deal with these difficulties that have been highlighted would be to either focus on primary rules (2.3.1) or propose some technical adjustments in the secondary rules (2.3.2). However, as will be suggested below, these approaches are unsatisfactory (2.3.3).

#### 2.3.1. Relying on *ex ante* arrangements

First, it may be contended that questions of shared responsibility can be solved by relying on *ex ante* arrangements. Thus, it has been noted that whether or not two states are jointly responsible for a particular act is governed by what states had actually agreed to, whether in drafting the primary obligations, or in providing for secondary rules of liability.<sup>80</sup>

We recognize that primary rules are of key importance for understanding and addressing problems of shared responsibility. The type of responsibility (whether individual or shared) is to a large extent a function of the nature of the underlying primary obligation. When obligations provide (or prohibit) for collective action (or inaction), shared responsibility may be implied in case of breach.<sup>81</sup> If, contrariwise, obligations provide for individual action, no questions of shared (or joint and several) responsibility need arise (though they may arise).

Moreover, the prospect of litigation in situations of shared responsibility, based on uncertain rules of apportionment of responsibility and liability, may induce states to clarify the respective obligations and responsibilities beforehand. While responsibility essentially is a retrospective process (involving giving an account of prior conduct), it may trigger negotiations and standard-setting. An example are the agreements made

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<sup>80</sup> Eurotunnel Arbitration (*The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France*) Partial Award 2007.

<sup>81</sup> Eurotunnel Arbitration (*The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France*) Partial Award 2007.

by states in respect to climate change under the Kyoto protocol, which in several respects can be considered as an *ex ante* apportionment of responsibility.<sup>82</sup>

Moreover, the criteria that may be used in apportioning responsibilities *ex ante* may not be dissimilar from those used to apportion responsibilities after harm is caused and in any case will be relevant for the determination of responsibility *ex post facto*.

### 2.3.2. Modifying the secondary rules of responsibility

A second possible approach to the difficulties raised would be to provide a series of specific principles of shared responsibility to fill the “gaps” of the ILC Articles.

Such principles could replace the fiction of exclusive attribution (eg under Articles 6, 17 and 18) with the possibility of shared attribution of conduct or shared responsibility.<sup>83</sup> It also could clarify how to divide responsibility and damages between multiple tortfeasors, including the role of fault and causation,; the legal basis for a responsible state to claim part of the damages due from a co-responsible state,<sup>84</sup> etc.

In the system of the ILC Articles, this could lead to a proposal to introduce a new article in Chapter 2 of Part I of the Articles that would reflect our findings on the attribution of conduct, a new article in Part II of the Articles that could mirror the new rule on the allocation of reparation obligations and finally a new article in Part III of the Articles identifying new procedural rules for claims against multiple tortfeasors.

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<sup>82</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998); see also C Stone, ‘Common but Differentiated Responsibilities in International Law’ (2004) 98 *The American Journal of International Law* 276.

<sup>83</sup> J D Fry, ‘Coercion, Causation, and the Fictional Elements of Indirect State Responsibility’ (2007) 40(3) *Vanderbilt Journal of Transnational Law* 611, 638.

<sup>84</sup> C Dominicé, ‘Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State in The Law of International Responsibility’ in J Crawford, A Pellet and S Olleson, (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 284.

By providing clarity on such points, the possibilities that parties will actually be willing to entrust adjudication of claims of shared responsibility to courts may increase.<sup>85</sup>

### 2.3.3. The illusive character of these solutions

However, both reliance on primary rules or a few technical changes to secondary rules would not be satisfactory.

As to the former, we argue that reliance on primary norms in itself will not be able to fulfill the functions that, as we argue, may be fulfilled by a system of shared responsibility. For one thing, the number of obligations that are actually accompanied by some form of shared responsibility rules, whether in terms of attribution or reparation, is fairly limited. While states and organizations may consider including such provisions in future arrangements, it is not realistic to expect an overhaul of a large number of existing treaty arrangements. In any case, this solution is unlikely to work for rules of customary international law.

Moreover, even if there is *ex ante* allocation, that is unlikely to address all aspects of the attribution of responsibility, and more specifically shared responsibility, in relation to issues such as fault, causation, quantum and criteria for reparations, etc. In effect, there will always be a need for a comprehensive set of secondary rules dealing with state responsibility.<sup>86</sup>

In addition, even should states systematically provide for principles of responsibility in conjunction with their primary obligations, they would be able to adopt different rules for similar situations which would raise issues of legitimacy and foreseeability

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<sup>85</sup> D Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' in RB Lillich and DB Magraw (ed), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, NY, Transnational Publishers, 1998) 163 (noting that it will be not 'simple for arbitrators to determine the percentage of contribution or that States will feel comfortable with leaving such a difficult determination to arbitrators.').

<sup>86</sup> B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law*, 483.

and, on a more conceptual level, could be seen as a challenge to the coherence of the international legal order.

More generally, formulating a set of primary rules or a few new secondary principles raises fundamental conceptual, methodological and political challenges. Indeed, given the normative implications of alternative arrangements, formulating principles on shared responsibility can hardly be conceived as a technical exercise. It would be intellectually unsatisfactory, a little bit like adding floors to a building without considering its foundations. It will appear in the next section that the rise of situations in which shared responsibility occurs is part of more fundamental processes and changes in the international legal order. The ambition of the project is not only to find technical solutions for dealing with situations of shared responsibility, but to understand and explain how they can be made consistent with these processes and changes. Indeed, as will be shown in the next section, the evolving nature of the international system justifies not only that we think about how to deal with shared responsibility, but also whether the current framework allows us to do so, not only in a technical sense, as was shown previously, but also in a conceptual one.

### **3 New Conceptual Foundations for Shared Responsibility: Revisiting State Responsibility as a differentiated regime**

The SHARES project will go beyond formulating narrow principles for apportioning responsibilities between multiple wrongdoing actors, and also consider how shared responsibilities are shaped by fundamental changes in the international legal order in general and the law of responsibility in particular. The following section will therefore first highlight some salient dynamics in the international legal order which contextualize the increase in situations of shared responsibility, and with which principles of shared responsibility should be capable of dealing (3.1). The following sections will revisit three foundations of the current framework of international responsibility that are of central importance to the principles and procedures applying to shared responsibility, namely the unity of international responsibility (3.2), the dichotomy between primary and secondary norms (3.3) and finally the dichotomy between responsibility and liability (3.4). Based on these findings, the final part of

this section will subject a new approach to State responsibility based on the identification of differentiated regimes of international responsibility (3.5).

### 3.1. Underlying dynamics

The increase in situations of shared responsibility cannot be understood without considering the evolutions that international society and the international legal order have gone through in recent decades. These changes reveal five fundamental trends that contextualize the way issues of shared responsibility are approached: moralization, heterogeneity, interdependence, permeability and judicialization. These trends influence each other in an intertwined way and provide the background for considering the possible changes to the international law of international responsibility, and of the principles of shared responsibility. This interaction between the different trends should be kept in mind, their chronological presentation in the following sections being somewhat artificial, because they are often just different ways of describing the same phenomena and more specifically they are both causes and consequences of each other.

#### 3.1.1. Moralization

Moving away from the realist view of international relations seen as States finding a balance of power and vying for the protection of their own interest, the international arena, and, as a consequence, the international legal order, have evolved in the direction of an increased “moralization”. The word is meant here in the most neutral way possible, as a description of the change in the discourse and *telos* of international law, rather than as an evaluation of the desirability or not of this trend. The history and foundations of this trend have been vastly commented upon.<sup>87</sup> In a nutshell, this moralization is due to a fundamental paradigm shift from state sovereignty as the cornerstone of the legal order, to the rights of the individual.<sup>88</sup> In view of the centrality of the human person in this trend, other authors have referred to this trend

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<sup>87</sup> A A Cancado Trindade, *International Law for Humankind, Towards a new Jus Gentium* (Martinus Nijhoff Publishers, 2010); A Peters, ‘Humanity as the A and Ω of Sovereignty’ (2009) 20 *European Journal of International Law* 513.

<sup>88</sup> And, by extension, the “peoples”, see ICJ, Advisory Opinion on *Accordance With International Law Of The Unilateral Declaration Of Independence In Respect Of Kosovo*, 22 July 2010, Separate Opinion of Judge A.A. Cancado Trindade,

as ‘humanisation’ of international law.<sup>89</sup> It should be noted that there are in fact two related sides to this trend: the first one, as just exposed, relating to the centrality of the individual, and the second one, more collective, that has seen the development of the notion of the “international community”..<sup>90</sup>

The trend of moralization is far from being universally accepted.<sup>91</sup> However, it is a highly relevant contextual element especially for discussions on shared responsibility, because such situations arise predominantly in areas that carry heavy moral undertones and therefore lend themselves much better to a moralization of the discourse. Indeed, there is a direct connection between the moral arguments underlying a shared responsibility to take action to achieve certain interests, on the one hand,<sup>92</sup> and the legal questions of shared responsibility in regard of international wrongdoing.

In this context, this trend has strong consequences in relation to the issue of responsibility. It goes hand in hand with the emergence of a culture of accountability,<sup>93</sup> in which many find that it is no longer acceptable for states or other actors to not be held accountable for their actions, and be held liable to pay reparations for damage caused. It also has induced a call for transparency in public policy that in the past was protected by the idea of State interest.<sup>94</sup> Furthermore, it changes to an extent the nature of international law by introducing, as we will discuss below in section 3.3, a hierarchy of norms, where certain norms carry more

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<sup>89</sup> T Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006); A Peters, ‘Humanity as the  $\Lambda$  and  $\Omega$  of Sovereignty’ (2009) 20 *European Journal of International Law*, 513.

<sup>90</sup> For an overview of the historical evolution towards the taking into account of community interests in the law of state responsibility, see G Nolte, “From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations’ (2002) 13 *European Journal of International Law* 1083. See also, S Villalpando, *L’émergence de la communauté internationale dans la responsabilité des Etats* (PUF, 2005).

<sup>91</sup> See eg J d’Aspremont, ‘The Foundations of the International Legal Order’, (2007) 18 *Finnish Yearbook of International Law* 219 and Y Onuma, ‘In Quest of Intercivilizational Human Rights: “Universal” vs. “Relative”’, 1 *Asia-Pacific Journal on Human Rights and Law* (2000) 53.

<sup>92</sup> L May, *Sharing Responsibility* (University of Chicago Press, 1996).

<sup>93</sup> M Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge University Press, 1998); C Harlow, ‘Accountability as a Value in Global Governance and for Global Administrative Law’ in G Anthony (ed), *Values in Global Administrative Law* (Hart Publishing, 2011) 173.

<sup>94</sup> P Ala’i, ‘From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance’ (2008) 11(4) *Journal of International Economic Law*, 779.

importance for the international community as a whole and the violation of which therefore might entail a stricter regime of responsibility.

In the same way, this trend has affected the content of international norms, through the operation of rules of interpretation,<sup>95</sup> or in the process of identification of the substance of international customary law.<sup>96</sup> This moralization therefore underlies the public order dimension of international law, which in turn informs the public order objective of international responsibility, as will be discussed in section 3.2.

### 3.1.2. Heterogeneity

The multiplication of actors and the heterogeneity of those actors that participate in international society<sup>97</sup> have direct bearing on questions of shared responsibility.

This is most immediately obvious for international organizations. States now regularly defer to international organizations to legislate on a wide-ranging array of topics, from cultural heritage to health and environmental law, or at the very least accept that the legislative process take place within these organizations.<sup>98</sup> The increased importance of international organizations, both at the regional and at the global level may and indeed is likely to lead to questions of shared responsibility between multiple organizations or between organizations and states.

Likewise, the increased role of private actors in international relations will lead to a multiplication of questions of shared responsibility. States frequently delegate powers, to private entities; the use of private military contractors by States is an obvious

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<sup>95</sup> R Gardiner, *Treaty Interpretation* (Oxford University Press, 2008).

<sup>96</sup> For an example in international criminal law, see N J Arajärvi, 'The Lines Begin to Blur? *Opinio Juris* and the Moralisation of Customary International Law' (2011). Available at SSRN: [www.ssrn.com/abstract=1823288](http://www.ssrn.com/abstract=1823288).

<sup>97</sup> R Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995).

<sup>98</sup> The WTO illustrates this trend, by providing a formal negotiation forum for international trade, thus centralizing discussions on this issue within one institution. In relation to this see, M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 914 (arguing that '...the procedure by which international law is generated increasingly attenuates the link between state consent and the existence of an obligation under international law').

example, which raises questions on the corresponding distribution of responsibility for damages caused.<sup>99</sup> While the orthodox position is that as a matter of international law only the delegating state can be responsible, we should consider the role and possible co-responsibility of the private entity itself.

Apart from delegation by the state, some private entities exercise powers, directly or through their influence on states, that cannot be ignored in assessing shared responsibilities. This is most certainly true in relation to the world economy, where corporations wield influence equal – and sometimes greater – to some States. The financial crisis in the EU in 2009, with the intricate relationship between national policies, European policies and the influence of private actors, such as rating agencies provides a good illustration thereof.<sup>100</sup> Even when such private actors generally will not be responsible as a matter of international law, as a factual matter they may contribute to (financial) damage, raising the question whether and how that influence should be relevant as a matter of international law.

Where private parties hold subjective rights under international law,<sup>101</sup> the number of legal relationships governed by international law, and potentially leading to situations of (shared) responsibility, increases proportionally. Highly relevant to issues of shared responsibility, therefore, is the intrusion of private entities in the international judicial arena, notably in international investment law and the corresponding practice of arbitration,<sup>102</sup> and human rights bodies, which allow individual petitions to be made.<sup>103</sup> The abovementioned cases before the ECtHR,<sup>104</sup> cases of extraterritorial

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<sup>99</sup> N D White and S MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19 *European Journal of International Law* 965.

<sup>100</sup> See, eg: J Katz et al., 'Credit Rating Agencies: No Easy Solutions, Crisis Response' (2009), available at [rru.worldbank.org/documents/CrisisResponse/Note8.pdf](http://rru.worldbank.org/documents/CrisisResponse/Note8.pdf) (stating that in the United States and Europe, faulty credit ratings and flawed ratings processes are widely perceived as being among the key contributors to the global financial crisis). See also, COM(2008) 704 final 2008/0217 (COD) Proposal for a regulation of the European parliament and of the Council on Credit Rating Agencies {SEC(2008) 2745} {SEC(2008) 2746}, Brussels, 12.11.2008, at 2.

<sup>101</sup> A Peters, 'The Subjective International Right' (2011) 59 *Jahrbuch des öffentlichen Rechts der Gegenwart*, Social Science Research Network, 411.

<sup>102</sup> Art. 25 ICSID Convention, L Reed, J Paulsson, N Blackaby, *Guide To ICSID Arbitration* 2nd edn, (Kluwer Law International, 2010) 24.

<sup>103</sup> P Sardaro, 'The Right of Individual Petition to the European Court', in P Lemmens and W Vandenhoele (ed) *Protocol no. 14 and the reform of the European Court of Human rights* (Intersentia, 2005) 45; A F Bayefsky, 'Direct Petition in the UN Human Rights Treaty System' 95 *American Society of International Law Proceedings* 71. Individual petition systems (IPs) have been created under the following treaties: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (6 October 1999) 38 ILM 763 ["CEDAW Optional Protocol"];

migration policy, and violations of international humanitarian law during joint military operations illustrate the point.

Also the possibility that individuals are being subjected to international obligations and individual responsibility is relevant to shared responsibility and more in particular to what we call shared accountability.<sup>105</sup> It allows for the situation that one or more individuals cause part of an injury to which states or other actors also contribute. Should we think of the atrocities in Srebrenica in the responsibility of Serbia, the UN, the Netherlands, or General Mladic separately, or is there merit in seeing these forms of responsibility in their mutual relationship?<sup>106</sup>

Finally, it should also be pointed out that heterogeneity does not only apply *ratione personae*, it also applies *ratione materiae*, which is also affected by the former. Indeed, the diversity of actors at the international level has contributed to a diversity in the sources and forms of the norms that are applicable, due to the diversity and ambiguity of the international law making process.<sup>107</sup> This material heterogeneity operates on a number of levels. For one, it makes it more difficult to determine the existence in international law of a given obligation, which in turn affects the responsibility that might flow from this obligation. Second of all, within the legal norms, it affects the identification of the norms applicable to different types of actors and creates a possible discrepancy between the entities under consideration. This is particularly relevant for situations of shared responsibility where different entities

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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, art 22 [“CAT”]; Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 302 [“ICCPR Optional Protocol”]; American Convention on Human Rights (22 November 1969) 1144 UNTS 123 [“ACHR”]; European Convention, Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221 (as amended by Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (11 May 1994) ETS no 155); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (10 June 1998) OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III).

<sup>104</sup> See *supra*, text to notes 60-61.

<sup>105</sup> See A Peters, ‘The Subjective International Right’ (2011) 59 *Jahrbuch des öffentlichen Rechts der Gegenwart*, Social Science Research Network, 411.

<sup>106</sup> For the longstanding debate on individuals as subjects of IL see P P Remec, *The position of the individual in international law according to Grotius and Vattel* (Nijhoff, 1960); A Orakhelashvili, ‘The position of the individual in international law’ (2001) 31 *California Western International Law Journal* 241.

<sup>107</sup> See for an example of the complexities of modern international rule-making A Lang and J Scott, ‘The Hidden World of WTO Governance’ (2009) 20 *European Journal of International Law* 575.

might not be facing the same type of responsibility despite having contributed at some level or another to a single injury.<sup>108</sup>

### 3.1.3. Interdependence

The third trend of the international legal arena that is relevant to shared responsibility is that of interdependence, due to the passage from a society of coexistence to a society of cooperation.<sup>109</sup> States increasingly consider that certain issues are better dealt with collectively, in the context of multilateral negotiations or in the context of international institutions.

The increased awareness that certain issues affect the international community as a whole, and that there exist common goods<sup>110</sup> that need to be dealt with collectively, directly influences the occurrence of situations of shared responsibility. A prime example is the issue of climate change, which cannot be left to individual and isolated actions.<sup>111</sup> Another example is the creation of the G20 which stems from the realization that, in an interdependent and globalised world, economic policies must also be mutualized if they are to have any effect.<sup>112</sup>

There is certainly an issue of efficiency involved, such as in the case of multilateral trade agreements, but also, for certain areas, legitimacy is an important incentive for collective endeavors. An example of this is international military operations. A state acting on its own will more easily be open to the criticism of acting for its own

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<sup>108</sup> See more particularly our discussion of shared accountability, *infra*, section 5.1.3.

<sup>109</sup> See W Friedmann, 'Cours général de droit international public' (1969) *Recueil des Cours de l'Académie de Droit International*, 47, 127; G Abi Saab, 'Whither the International Community?' (1998) 9 *European Journal of International Law* 248; P M Dupuy, 'International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions' (1998) 9 *European Journal of International Law* 278.

<sup>110</sup> E-U Petersmann, 'International Economic Law, 'Public Reason', and multilevel governance of interdependent public goods' 14 (1) *Journal of International Economic Law*, 23.

<sup>111</sup> See Faure and Nollkaemper, *supra* n 2.

<sup>112</sup> The Group of Twenty: A History (produced by the G20, 2008) available at [http://www.g20.org/Documents/history\\_report\\_dm1.pdf](http://www.g20.org/Documents/history_report_dm1.pdf). See also G-20 Toronto Summit Declaration of June 27 2010 noting in its Preamble that the G-20 is a 'premier forum for international economic cooperation'.

interests, whereas in a concerted action with the UN, other interested States or regional organizations will act as a factor of legitimization of the military operation.<sup>113</sup>

These examples more generally highlight that the trend of interdependence, in relation to the trend of heterogeneity, informs another shift of the international legal order towards global governance. The increase in the number of international institutions, in a more or less formalized setting, responds to this shift and to the necessity to deal with certain issues at a more elaborate organizational level, thus creating an increase in the number of situations of shared responsibility.<sup>114</sup>

It should be noted that the reasons for the increased interdependence are both objective and subjective. As to the former, in certain areas, things have factually changed. International economy, for example, is more and more integrated, with any local crisis having immediate impact globally. In other areas it is merely the perception that has changed, rather than reality. For example, it is no longer acceptable that a genocide be committed without some international intervention to stop it. What informs this change of perception is the trend of moralization as discussed previously.<sup>115</sup>

This interdependence, in correlation with the heterogeneity analyzed previously, raises important normative questions in relation to shared responsibility. Indeed, it is a profound challenge to the individualization of responsibility as illustrated by the traditional principle of independent responsibility, as illustrated previously.<sup>116</sup> As a consequence, it is an invitation to explore more deeply the exact nature of this interdependence and how this affects the conditions for multiple attribution of responsibility, more particularly in light of the public/private dichotomy of international responsibility that will be explored at a later stage. For example, how

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<sup>113</sup> P Buhler, 'Military Intervention and Sources of Legitimacy', in G Andréani and P Hassner, *Justifying war? : From Humanitarian Intervention to Counterterrorism* (Palgrave Mcmillan, 2008) 167 and N Tsagourias, 'Cosmopolitan Legitimacy and UN Collective Security', in R Pierik and W Werner (eds), *Cosmopolitanism in context: perspectives from international law and political theory* (Cambridge University Press, 2010) 129.

<sup>114</sup> A Buchanan and R O Keohane. 'The Legitimacy of Global Governance Institutions', (2006) *Ethics and International Affairs* 20 (4):405–437. C Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law' in G Anthony (ed), *Values in Global Administrative Law* (Hart Publishing, 2011) 173.

<sup>115</sup> *Supra*, section 3.1.1.

<sup>116</sup> See *supra*, section 2.1.1.

should the involvement of private actors, to the extent that they now act in a field usually left to the exclusivity of states or international organizations, affect the possibility of holding them responsible before international courts? Inversely, how does the increased intervention of these “new” entities affect the responsibility of states, which could hide behind the diluted nature of concerted actions to reduce their own responsibility?

#### 3.1.4. Permeability

A fourth trend to be considered, which has an impact on the issue of shared responsibility, is that of permeability of the international and national legal orders. While there have always been interactions between legal orders, with both substantial and institutional dimensions,<sup>117</sup> also in light of the other trends we have identified previously, from a methodological perspective, the usefulness of the starting point of a strict separation of legal orders is limited, and it is the permeability between the two that should be highlighted.

The phenomenon of permeability has two consequences in particular for shared responsibility. For one, the shift to the individual as a competing primary concern (moralization) and the corresponding increased access that the individual has to international institutions (heterogeneity) means that the limit of the state, which traditionally delineated the separation of legal orders, is becoming more blurred. The individual is now provided, under certain conditions, such as the exhaustion of local remedies, with a range of fora, both international and national from which he can choose from, whereas before he was limited to national courts to obtain satisfaction.

Second, institutionally, national courts are increasingly thought of as part of a comprehensive system of implementation of international law, in a realization of the *dualité fonctionnelle* of Scelle.<sup>118</sup> Indeed, not only do national courts apply

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<sup>117</sup> J Nijman and P A Nollkaemper, *New Perspectives on the Divide between International and National Law* (Oxford University Press, 2007) 416.

<sup>118</sup> G Scelle, ‘Règles générales du droit de la paix’ (1933) 46 *Recueil des Cours de l’Académie de Droit International* 331, 356. See for a discussion of Scelle’s theory: A Cassese, ‘Remarks on Scelle’s

international law, but they can do so to strengthen the international order.<sup>119</sup> The most integrated example of that is the European Union, where, in essence, national courts can be considered as the lower-tier courts of application of European Law. But this is also true in other fields, including, in many (but not all) parts of the world, international human rights law. It also includes international criminal law, where any comprehensive assessment of its enforcement includes discussion of the role of national courts, more particularly through the principle of complementarity<sup>120</sup> and the exercise of universal jurisdiction.<sup>121</sup>

Third, despite the general concept of the irrelevance of national law in international proceedings,<sup>122</sup> international courts rely heavily on national law to determine the state of the law, to develop concepts of international law, to establish the existence of norms and to interpret existing norms.<sup>123</sup> For example, international criminal procedure has been developed as a mixture of the common law and the civil law systems of procedure.<sup>124</sup> Another example, in international investment law, is the direct import of United States case-law concepts, such as “distinct investment-backed expectations”, in the context of the application of standards such as the fair and equitable treatment and indirect expropriation.<sup>125</sup>

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Theory of “Role Splitting” (dédoublage fonctionnel) in International Law’ (1990) 1 *European Journal of International Law* 210, 210.

<sup>119</sup> P A Nolkaemper, *National courts and the International Rule of Law* (Oxford University Press, 2011).

<sup>120</sup> J T Holmes, ‘Complementarity: National Courts versus the ICC’, in A Cassese, P Gaeta, J R W D Jones (ed), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford University Press, 2002) 667.

<sup>121</sup> L Reydam, *Universal Jurisdiction; International and Municipal Legal Perspectives*, (Oxford University Press, 2003) 28-42. Further confirming this is the increasing challenges to functional immunities of state officials for international crimes based on the nature of the acts, irrespective of whether the immunity is claimed before a national or an international court, see R Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, 2008); H van der Wilt, ‘The Issue of Functional Immunity of Former Heads of State’ in W J M van Genugten, M P Scharf, S E Radin (ed) *Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference*, (T.M.C. Asser Press, 2009) 100.

<sup>122</sup> See more particularly for State Responsibility, Article 3 (on the characterization of the act as internationally wrongful) and Article 32 (on the irrelevance of national law in relation to compliance with obligations of reparations).

<sup>123</sup> H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green and Co, 1927).

<sup>124</sup> K Ambos, ‘International Criminal Procedure: “adversarial”, “inquisitorial” or mixed?’ (2003) 7 *International Criminal Law Review* 335.

<sup>125</sup> Y Radi, ‘Realizing Human Rights in Investment Treaty Arbitration From the Inside: A Perspective From Within the International Investment Law ‘Toolbox,’ *North Carolina Journal of International Law and Commercial Regulation* (forthcoming).

These aspects can impact international responsibility and more particularly shared responsibility. For one, this identified influence of national law on international proceedings comforts part of our comparative law methodology in assessing rules of shared responsibility, most notably those relating to the implementation of responsibility, as apparent in section 4.1. Second, it justifies the direction the project will take in relation to Shared Accountability, as defined in section 5 below. National institutions cannot be ignored in the identification of the web of mechanisms that shape the field, because they are an intrinsic part of any efficient system of accountability.

What has been said above on the permeability of the dividing line between international and national legal orders applies also to the line between the general international legal order and the internal order of international organizations. Formally these legal orders are separated, also in the law of international responsibility.<sup>126</sup> However, from the perspective of shared responsibility the boundaries are not watertight, as, for instance, internal accountability mechanisms can contribute to shared responsibility.

### 3.1.5. Judicialization

The fifth and final trend that is relevant to our approach to questions of shared responsibility is the increasing judicialization in matters of international law. Judicialization certainly is not limited to international law,<sup>127</sup> but has had a profound impact on international law in the last few years. We have seen an increase in the case-load of existing tribunals and the establishment of new tribunals. The practice of the International Court of Justice, the dispute settlement mechanism of the World Trade Organization, investment arbitration, the International Tribunal for the Law of the Sea and regional human rights courts illustrates this trend. Furthermore, supervisory bodies that have been established to control compliance with treaty obligations in respect of human rights, multilateral environmental agreements and

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<sup>126</sup> C Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', (2011) *Amsterdam Center for International Law Research paper No. 2011-03; Amsterdam Law School Research Paper No. 2011-04*. Available at SSRN: <http://ssrn.com/abstract=1825182>.

<sup>127</sup> See M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, 2002).

international labour law, have adopted decisions in an increasing number of specific cases. National courts further add to the practice of adjudication of claims based on international law.

To be sure, this phenomenon co-exists with movements which lead in other directions (such as the increasing amount of global governance outside the realm of international law proper, and thus also outside international courts).<sup>128</sup> Nonetheless, in quantitative terms the trend towards judicialization is a strong one.

This trend has clear implications for our approach to shared responsibility. It may be said that in the past there was no strong need for detailed rules on shared responsibility, simply because there were few cases and because as long as claims are settled outside courts, these are less likely to resort to such technical rules. But as more claims involving multiple responsible parties will reach the courts, there will be an increasing need for more detailed and subtle rules on allocation of responsibility between multiple responsible parties.

The trend towards judicialization is fuelled by several of the above developments, in particular heterogeneity of actors (the areas where most judicial decisions are rendered are those where private parties have either individual rights – as in human rights and investment law – or individual obligations – as in international criminal law) and the permeability between international and national law (as national courts increasingly adjudicate claims based on international law, and the number of such decisions vastly outnumbers the number of judgments by international courts).

However, we also note that this raises fundamental questions about the authority and legitimacy of international courts, both in terms of their influence on individual cases and on their contribution to the development of international law. Principles and processes of shared responsibility involve fundamental normative questions pertaining

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<sup>128</sup> This latter trend is relevant for our examination of patterns of shared accountability.

to the allocation of responsibility, and the question should be considered if these decisions are in good hands with international courts.<sup>129</sup>

### 3.2 Moving away from the unity of the law of international responsibility<sup>130</sup>

How we address questions of shared responsibility depends in part on the understanding of the nature and aims of international responsibility. Questions of joint and several liability are strongly associated with a private law paradigm, and involve a transposition of notions of private law to the international level. Thus, in this Separate Opinion in the *Oil Platforms* case, Judge Simma examined private law principles and derived from these a general principle.<sup>131</sup> Alford similarly compares national legal systems to identify a possible international principle of joint (and several) liability.<sup>132</sup> However, it may be possible to conceive shared responsibility in terms that are less associated with private law regimes. For instance, the proposition of counsel for Yugoslavia in the *Legality of the Use of Force* case that NATO states were involved in a joint enterprise<sup>133</sup> has as many connotations with the criminal law notion of joint criminal enterprise than it does with private law.

We argue that the concept of shared responsibility can encompass several legal phenomena, some of which are more akin to private law concepts, and some of which resemble more public law ones. The developments identified in the previous paragraph sustain and strengthen both aspects, making it more difficult for one set of principles to cater to both interests. In effect, we thus need to consider and debundle

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<sup>129</sup> A von Bogdandy and I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2010) available at: [www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1593543](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1593543).

<sup>130</sup> This section is in part based on P A Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 *Indiana Journal of Global Legal Studies* 535.

<sup>131</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion of Judge Simma, I.C.J. Reports 2003, p. 324; 354-358.

<sup>132</sup> R P Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011) 38(2) *Pepperdine Law Review* 233.

<sup>133</sup> *Legality of Use of Force (Serbia and Montenegro v United Kingdom)*, Oral Proceedings, Public Sitting 12 May 1999, CR 1999/25, 16.

the dominant notion of the law of international responsibility as a unitary phenomenon.

### 3.2.1 What is the unity of international responsibility?

The common understanding is that the rules on the International Responsibility of States and the Responsibility of International Organizations form a single, unitary system.<sup>134</sup> Since the international legal system has essentially been conceived as different from domestic legal systems, the domestic notions of private or public law have not easily been transposed to the international level. Indeed, international law does not distinguish between contractual and tortious responsibility, or between civil, criminal, or other forms of public law (administrative) responsibility.<sup>135</sup> Pellet rightly warned against undue domestic analogies when he wrote that international responsibility is neither public nor private, but ‘simply international’.<sup>136</sup>

What is meant by the law of responsibility as a unitary system, is that the various forms of responsibility (fault-strict, ordinary wrongs, wrongs arising out of serious breaches of peremptory norms, etc.) are subject to the same general principles of responsibility, and that they form a relatively coherent whole. For instance, it is thought, though not without controversy,<sup>137</sup> that serious breaches of peremptory norms are subject to the same principles of attribution, defenses, and reparation as ordinary wrongful acts. In the *Genocide* case, the ICJ stated that the particular characteristics of genocide do not justify that the Court depart from the criteria for attribution as they apply under general international law:

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<sup>134</sup>J Crawford and S Olleson, ‘The Nature and Forms of International Responsibility’ in M. Evans (ed), *International Law* (Oxford University Press, 2003) 451.

<sup>135</sup> *Rainbow Warrior (New Zealand v France)*, 1990 Arbitration Tribunal, 20 RIAA 217; Crawford & Olleson, *supra* n. 2, at 451-452.

<sup>136</sup> A Pellet, ‘Can a State Commit a Crime? Definitely, Yes!’ (1999) 10 (2) *European Journal of International Law* 425, 433-434.

<sup>137</sup> G Abi-Saab, ‘Whatever Happened to Article 19’, in A Fischer-Lescano and M Bothe (eds.), *Frieden in Freiheit: Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos, 2008) 821 ; P M Dupuy, ‘Action publique et crime international de l’Etat : à propos de l’article 19 du projet de la Commission du droit international sur la responsabilité des états’, (1979) 25 *Annuaire Français de Droit International* 539 ; S. Rosenne, ‘State responsibility and international crimes : further reflections on Article 19 of the Draft Articles on State Responsibility’, (1997) 30 *New York University journal of international law and politics* 145.

[t]he rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.<sup>138</sup>

The question before us is whether principles that might be applicable to shared responsibility, *de lege lata* as laid down in section 3, or *de lege ferenda*, as possible outcomes of the research, can be captured within this single unitary system. At this early stage of the project, we argue that there is all reason to be critical of the unitary perspective, and that indeed this has hampered the development of international responsibility to fulfill the necessary functions in regard to shared responsibility.

At the outset, therefore, it is necessary to identify the distinct private and public law dimensions of international responsibility.

### 3.2.2 The Private law dimensions of international responsibility

International responsibility traditionally serves interests of individual states (rather than the general interest),<sup>139</sup> and is characterized by equality rather than subordination (which may be seen as part of a public law character).<sup>140</sup> In that respect, it shares a

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<sup>138</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43, par 401. See for a brief discussion of the question whether attribution in case of serious breaches of peremptory norms necessary is governed by the same principles as ordinary wrongs: P A Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 *International and Comparative Law Quarterly* 615.

<sup>139</sup> A Bleckmann, 'The Subjective Right in Public International Law' (1985) 28 *German Yearbook of International Law* 144.

<sup>140</sup> One may construe this in terms of the notion of states as a moral person (as postulated by De Vattel in *The Law of Nations*, preliminaries, par 2 (available at [http://www.constitution.org/vattel/vattel\\_pre.htm#002](http://www.constitution.org/vattel/vattel_pre.htm#002)), but embracing that conception is no condition for recognizing the structural horizontal similarity between states in international law and individuals in domestic law.

dominant feature of private law.<sup>141</sup> The core of the traditional law of international responsibility is the notion of legal injury caused by a breach of the law.<sup>142</sup> Anzilotti wrote that responsibility derives its *raison d'être* from the violation of a right of another state.<sup>143</sup> In view of these structural similarities, Lauterpacht concluded that public international law 'belongs to the *genus* private law,'<sup>144</sup> and Holland said that international law is 'private law writ large.'<sup>145</sup> There indeed is a remarkable overlap between the key principles of international responsibility, as partly codified by the ILC, and the principles of European tort law—an authoritative set of principles that, to a large extent, are common to domestic systems in Europe.<sup>146</sup>

This private law dimension remains relevant to shared responsibility. Principles such as causation,<sup>147</sup> contribution to the injury by the victim (state),<sup>148</sup> responsibility based on negligence or lack of due diligence,<sup>149</sup> defenses,<sup>150</sup> and reparation<sup>151</sup> — all recognized in the European Principles for Tort law —, are relevant for apportioning responsibility and damages between multiple wrongdoing states.<sup>152</sup>

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<sup>141</sup> R Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 41(1) *San Diego Law Review* 3 (discussing the concept of interactive justice).

<sup>142</sup> B Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury', in M Ragazzi (ed), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Martinus Nijhoff, 2005) 93.

<sup>143</sup> D Anzilotti, 'Teoria generale della responsabilità dello Stato nel diritto internazionale', in *Opere Di Dionisio Anzilotti*, II 1 (1956) cited in Second Report on State Responsibility, by R Ago, Special Rapporteur — the origin international responsibility, extract from the *Yearbook Of the International Law Commission Vol. 2* (1970) at 192, note 102 see ([http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_233.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_233.pdf)).

<sup>144</sup> H Lauterpacht, *Private law sources and analogies of international law* (Longmans, Green and Co, 1927, reprinted in 2002) 81.

<sup>145</sup> T E Holland, *Studies in international law* (Clarendon Press, 1898) 152.

<sup>146</sup> See European Group of Tort Law website, at [www.civil.udg.es/tort/Principles/](http://www.civil.udg.es/tort/Principles/); The Principles on European Tort Law are also published as PRINCIPLES OF EUROPEAN TORT LAW - TEXT AND COMMENTARY (2005).

<sup>147</sup> Art. 3:101 of the Principles of European Tort Law; compare the formulation of the standard of causation by the ICJ in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43, par 462.

<sup>148</sup> Art. 3:106 and 8:101 of the Principles of European Tort Law; compare ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), art 39.

<sup>149</sup> Art. 4:101 and 4:102 of the Principles of European Tort Law; compare the general due diligence standards in international law as discussed by R Pisillo-Mazzeschi, 'The due diligence rule and the nature of the international responsibility of states' (1992) 35 GYIL 9.

<sup>150</sup> Art. 7:101 of the Principles of European Tort Law; compare Art. 20-27 of the Articles on State Responsibility.

<sup>151</sup> Art. 10 :101 of the Principles of European Tort Law, compare ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), art 31.

<sup>152</sup> Compare also the influence of domestic tort law on general principles; see *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate Opinion of Judge Simma, I.C.J. Reports 2003, p. 324; 324-361.

### 3.2.3 The public law dimensions of international responsibility

Modern international law of responsibility has a distinct public law dimension. It is said to be of an objective nature, in the sense that responsibility can arise regardless of damage to any particular state or organization.<sup>153</sup>

Both the Articles on State Responsibility and the Articles on the Responsibility of International Organizations provide for two conditions for the existence of an internationally wrongful act: the act must breach an obligation of the state and the act must be attributable to the state. There is no mention of damage or injury.<sup>154</sup> Responsibility thus is not contingent upon the showing that a disputed act has caused injury to a state or other person vis-à-vis whom an international obligation is owed, but rather is premised on the notion of an illegal act.<sup>155</sup> The law of international responsibility would not only protect rights of injured parties, but would also protect the international legal order as such against acts that violate international law.<sup>156</sup>

The practical consequence of the elimination of damage as a condition of responsibility is that the obligations of cessation, continued performance, and reparation are not contingent on invocation by a responsible state. Whereas reparation was mainly considered a right of the injured state in the traditional law of state responsibility, the ILC – following the lead of Roberto Ago – took the position that the obligation to provide reparation is not dependent on a prior invocation of

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<sup>153</sup> See A Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 (2) *European Journal of International Law* 425, 438. Another way of illustrating this irrelevance of legal injury is its inclusion in the notion of wrongfulness itself, as expressed by D Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers' (1906) 8 *Revue Générale de Droit International Public* nos. 1-2, at no. 1, 13: 'Le dommage se trouve compris implicitement dans le caractère antijuridique de l'acte. La violation de la règle est effectivement toujours un dérangement de l'intérêt qu'elle protège, et, par voie de conséquence, aussi du droit subjectif de la personne à laquelle l'intérêt appartient'.

<sup>154</sup> See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), Commentary to art 2, par 9 at [www.untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://www.untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>155</sup> A Pellet, 'Remarques sur une révolution inachevée. Le projet d'articles de la CDI sur la responsabilité des Etats' (1996) 42 *Annuaire Français de Droit International* 7; *supra* n 36, at 101.

<sup>156</sup> B Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury', in Raggazi (ed) *International Responsibility Today. Essays in Memory of Oscar Schachter* 93 (Martinus Nijhoff, 2005) 94 (noting that it would introduce a "review of legality through the institutions of international responsibility").

responsibility.<sup>157</sup> This may redress a fundamental weakness of the traditional law of international responsibility: the fact that the absence of invocation (for political or other reasons) rendered the law of responsibility non-operational in regard to acts that upset the international legal order. As a result, the ILC introduced the protection of legality as a freestanding legal objective. Indeed, the obligation of cessation,<sup>158</sup> and the obligation to provide guarantees of non-repetition,<sup>159</sup> have more to do with a return to legality than with reparation for injury.<sup>160</sup> While a few states have voiced their concern about the fundamental nature of the shift in the law of international responsibility that is brought on by the introduction of the notion of objective responsibility,<sup>161</sup> most states appeared to have few problems with the notion.

It is true that responsibility, abstracted from any particular injured party who may seek relief, becomes a rather esoteric notion. It is not easy to see how a court or other institution could consider a case of responsibility, determine injury, and fashion appropriate relief if there are no injured parties.<sup>162</sup> Nonetheless, basing responsibility on illegality rather than injury is a significant symbolic step towards a more public law oriented law of responsibility. This step is further buttressed by the abovementioned developments of interdependence<sup>163</sup> and moralization.<sup>164</sup>

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<sup>157</sup> According to Pellet, 'Ago's revolution' is most evident in Article 1 of the ASR, which simply states that "[e]very internationally wrongful act of a State entails the international responsibility of that State", without any reference to injury. See Allain Pellet, 'The ILC's Articles on State Responsibility', in James Crawford et al. (eds.), *The Law of International Responsibility* (Oxford: OUP 2010), 75-94, at 76-77. See also the discussion of principles of reparation by James Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507 (2000), par 26 (stating that "the general obligation of reparation arises automatically upon the commission of the internationally wrongful act. That obligation is not, as such, contingent upon a demand or protest by any injured State, even if the form that reparation should take in the circumstances may be contingent.").

<sup>158</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001) art. 30(a).

<sup>159</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001) art. 30(b).

<sup>160</sup> B Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury' in Raggazi (ed) *International Responsibility Today. Essays in Memory of Oscar Schachter* 93 (Martinus Nijhoff, 2005) 102.

<sup>161</sup> France in its comments on the ILC draft articles commented that draft Article 1 of the Articles on State Responsibility was not acceptable because it attempts to set up an international public order and to defend objective legality, rather than subjective rights of states. The aims of the law of responsibility should not be extended to protection of international law itself. State Responsibility, Comments and Observations Received from Governments, General Assembly A/CN.4/488, 25 March 1998. See also B Stern, 'A Plea for "Reconstruction" of International Responsibility based on the Notion of Legal Injury' in Raggazi (ed) *International Responsibility Today. Essays in Memory of Oscar Schachter* 93 (Martinus Nijhoff, 2005) 99, n. 12.

<sup>162</sup> Pellet wrote that these public forms of international responsibility are platonic. N O Dinh and A Pellet, *Droit International Public*, 6th edn (L.G.D.J, 1999) 765.

<sup>163</sup> *Supra*, section 3.1.2.

It therefore appears that the law of international responsibility encompasses quite distinct concepts and principles, serving different functions. It may be said that these concepts and principles have co-existed without major difficulties and that the unitary approach to the law of responsibility can serve a multitude of functions at the same time. However, we argue that precisely in relation to shared responsibility the unitary nature of international responsibility shows its limitations, for the system is both devoid of the necessary principles, procedures and mechanisms that allow it to address such problems.

### 3.2.4 Downsides of maintaining unity

Hanging on to the unitary approach to international responsibility has a number of negative consequences for the role that the law of international responsibility can play in addressing questions of shared responsibility. For one, the application of the current rules in this unitary context creates a certain substantial and institutional ambiguity (3.2.4.1). Moreover, unity can only be maintained to the detriment of the refinement of certain rules, both applying to the private and to the public dimensions of international responsibility (3.2.4.2).

#### 3.2.4.1. Substantial and institutional ambiguity

The coexistence of a private and a public law dimension within the general law of responsibility will lead to inconsistencies in the way the rules are articulated. Indeed, as was expressed previously, it is not always easy to reconcile the private law dimensions of some of the rules of state responsibility, such as the requirement of injury for invocation, and the public law dimensions, such as the exclusion of injury as a condition of responsibility. As will be elaborated further, accepting that there are different regimes may allow us to differentiate rules of responsibility depending on the situation.<sup>165</sup> For instance, while damage and causation may not be relevant in the public law dimension of international responsibility, they certainly will be relevant for its private law dimension.

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<sup>164</sup> *Supra*, section 3.1.1.

<sup>165</sup> *Infra*, section 4.

Clinging on to unity also creates tensions in the institutional role of international courts. The emphasis that the ECtHR now places on guarantees of non-repetition, signaling its increasing constitutional role in the protection of legality, may eventually make the ECtHR less accessible for compensation claims—and thus collides with an approach based on individual injury. These effects of course are primarily a consequence of organizational problems of the ECtHR, but they also are a necessary consequence of the use of competing public and private law conceptions of the role of the Court.

The same can be said of the International Criminal Court. Although it does not directly relate to state responsibility, it illustrates the tensions that arise when both public and private interests are expected to be attained within a single institution. Indeed, by adding a civil reparations dimension to the ICC Statute,<sup>166</sup> and more generally providing for the participation of victims in the criminal process,<sup>167</sup> the drafters have burdened this one court with finding a balance between vastly competing interests, most notably the rights of the victims and the rights of the defense, whereas such a conceptual difference might have warranted differentiated institutions.

#### 3.2.4.2. Unity at the cost of refinement

Maintaining unity may go at the cost of refinement, detail, and progress in those areas where there is no common ground. Both the principles of responsibility applying to reparation for injury, and the principles seeking a more public law function, may remain relatively undeveloped as a result of the attempt to keep them together.

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<sup>166</sup> Article 75, ICC Statute. See W Schabas, *The International Criminal Court, a Commentary to the Rome Statute*, (Oxford University Press, 2010) 878-883 and C Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002) 15 *Leiden Journal of International Law* 667.

<sup>167</sup> Article 68(3), ICC Statute. See also, C Stahn, H Olásolo and K Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC' (2006) 4 *Journal of International Criminal Justice* 219 and C Jorda and J Hemptinne, 'The Status and Role of the Victim' in A Cassese, P Gaeta and J R W D Jones (ed) *The Rome statute of the international criminal court : a commentary*, vol II (Oxford University Press, 2002).

The former, particularly relevant for shared responsibility, remains rather undeveloped. Major issues that need to be addressed when claims against multiple wrongdoers have to be decided are barely developed. Examples are questions of extinctive prescription,<sup>168</sup> joint and several liability,<sup>169</sup> and causation.<sup>170</sup> Perhaps such lacunae mostly go unnoticed at the level of general international law due to the fact that relatively few interstate claims actually lead to monetary damages if compared to the situation at the national level,<sup>171</sup> but the increasing judicialization of the law of international responsibility may make the need for a developed system of “private wrongs” for the handling of international claims more important. The rather undeveloped principles for handling civil claims was, for instance, felt in the determination of loss in the UN Compensation Commission,<sup>172</sup> the Ethiopia-Eritrea claims Commission,<sup>173</sup> and in the virtual absence of “private law” principles that the International Criminal Court can apply in handling claims by a victim.<sup>174</sup> Also, the ECtHR has been forced to develop its own *lex specialis* on several of these issues.<sup>175</sup>

As for the public law dimensions of the law of international responsibility, they remain relatively undeveloped and have been dealt with in an unprincipled and *ad hoc* manner, mostly outside the law of international responsibility. Given the fact that the unitary law of responsibility leaves little room for detailing such principles, as they might become inconsistent with other principles, states and organizations have opted

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<sup>168</sup> K Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration* (Iustus, 2001).

<sup>169</sup> J E Noyes, B D Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 *Yale Journal of International Law* 225.

<sup>170</sup> F Rigaux, ‘International Responsibility and the Principle of Causality’ in *International Responsibility Today: Essays in Memory Of Oscar Schachter* (2005) 81; T Becker, *Terrorism and the State: Rethinking The Rules of State Responsibility* (Hart, 2006).

<sup>171</sup> It is noteworthy, however, that in practice compensation regularly takes precedence over other forms of reparation, in particular restitution. For a discussion of the rather theoretical primacy given to restitution, see Christine Gray, ‘The Different Forms of Reparation: Restitution’, in Crawford et al. (eds.), *The Law of International Responsibility* (OUP, 2010), 589-597.

<sup>172</sup> D D Caron, ‘The UNCC and the Search for Practical Justice’, in *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* (1995) 367.

<sup>173</sup> J d’Aspremont and P D’Argent, ‘La Commission des réclamations Erythée-Ethiopie: un bilan à mi-parcours’, (2007) *Annuaire français de droit international* 347 and W Kidane, ‘Civil Liability for Violations of International Law: the Jurisprudence of the Eritrea-Ethiopia Claims Commission in The Hague’ (2007) 25 1 *Wisconsin International Law Journal* 23.

<sup>174</sup> G Greco, ‘Victims’ Rights Overview under the ICC Legal Framework: a Jurisprudential Analysis’ (2007) 7 2-3 *International Criminal Law Review* 531.

<sup>175</sup> M Pellonpää, ‘Individual Reparation Claims under the European Convention on Human Rights’, in A Randelzhofer and C Tomuschat (ed), *State Responsibility And The Individual: Reparation In Instances Of Grave Violations of Human Rights* (Nijhoff, 1999) 109.

to develop public law type principles (now often discussed in terms of global administrative law)<sup>176</sup> outside the law of responsibility.

We do recognize at this point that the principles of reparation as these are now laid down in the Articles on Responsibility of States and the Responsibility of International Organizations allow for a wide variety of legal consequences, that may be tailored to particular circumstances, taking into account the nature of the obligation and the nature of the breach, and indeed the public nature of the interests at stake. However, in the system of international state responsibility these consequences are all linked to the concept of injured state,<sup>177</sup> which thus reduces the potential flexibility of the modes of reparation.<sup>178</sup>

The preference to address public law aspects arising out of non-performance of international obligations outside the law of international responsibility is quite obvious for highly political issues. One of the reasons for the demise of the concept of state crimes was the fact that states preferred to leave the consequences of serious violations of fundamental international norms to political organs, notably the UN Security Council.<sup>179</sup> But it is also more generally true that states and international organizations do not treat public order questions in terms of responsibility. They do not seem to consider non-compliance mechanisms, under for example international environmental treaties, as a matter of international responsibility.<sup>180</sup> Indeed, they are precisely a response to the limits of the conceptual structures and limitations of the

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<sup>176</sup> B Kingsbury et al., 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15 ; B Kingsbury, R B Stewart, 'Legitimacy and Accountability in Global Regulatory Governance : the Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations', in *International administrative tribunals in a changing world : United Nations Administrative Tribunal Conference : organized under the auspices of the Executive Office of the Secretary-General, New York, Friday, 9 November 2007* (Esperia Publications, 2008) 193.

<sup>177</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), Art. 42.

<sup>178</sup> Article 48 (invocation by non-injured parties) at present does not provide more than a theoretical option remedy for that shortcoming, whose full conceptual and practical aspects are yet to be explored. see however, for example, A Gattini, 'A Return Ticket to 'Communitarisme', Please', 13 *European Journal of International Law* (2002), 1181 and P M Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility', 13 *European Journal of International Law* (2002) 1053.

<sup>179</sup> See eg the position of the US, State Responsibility – Comments and Observations received from Governments, UN Doc A/CN.4/515, 53.

<sup>180</sup> G Ulfstein et al. (ed), *Making Treaties Work: Human Rights, Environment And Arms Control* (Cambridge University Press, 2007).

classical doctrine of state responsibility.<sup>181</sup> Such procedures are not primarily concerned with making things good for victims, but are instruments to secure control of public power, to limit abuses of power, and to further the rule of law. They resemble more a public law concept of *ultra vires* acts and, in many respects, may be more akin to constitutional or administrative law principles.<sup>182</sup>

This approach to “public wrongs” outside the law of responsibility, in particular may be an area of potential growth for shared responsibility, eg a layer of legal processes short of international responsibility procedures which acknowledge burden sharing, good governance and global international administrative values.

However, while there thus has been some development of such public mechanisms by some form of global administrative law, the nature and contents of the accountability principles and their relationship with the law of responsibility<sup>183</sup> remains unclear, in particular where it concerns principles to situations of shared responsibility, for which practice seems to be extremely limited.<sup>184</sup>

In sum, both in its private law and in its public law dimensions, the law of responsibility is in need of further development, but it is highly unlikely that this can be achieved within the law of responsibility as a unitary set of principles. Different problems call for different solutions.

### 3.3 Reconsidering the distinction between primary and secondary norms

Addressing problems of shared responsibility also requires that we reconsider the distinction between primary and secondary rules. We argue that in examining any

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<sup>181</sup> J Brunnée, ‘International Legal Accountability Through the Lens of the Law of State Responsibility’ (2005) 36 *Netherlands Yearbook of International Law* 21.

<sup>182</sup> B Kingsbury et al., ‘The Emergence of Global Administrative Law’ (2005) 68 *Law & Contemporary Problems* 15.

<sup>183</sup> We do recognize that some non-compliance procedures, for instance under the Aarhus Convention, do frequently refer to principles of responsibility. See Case Law of the Aarhus Convention Compliance Committee (2004-2008) (Andrusevych Alge Clemens ed., 2008).

<sup>184</sup> U Linderfalk, ‘State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System’ (2009) 78 *Nordic Journal of International Law* 53.

particular question of shared responsibility, it often will be required to assess primary and secondary rules in their mutual connection. After having highlighted the difficult application of the dichotomy in the ILC Articles (3.3.1), this section will show the shaky conceptual foundations and confusion created by it (3.3.2) before suggesting how to move away from it (3.3.3).

### 3.3.1 The use of the dichotomy by the ILC

The rules relating to State Responsibility have traditionally been considered to be secondary rules of international law, as opposed to the primary rules of international law which provide for the content of the obligations of states. This distinction was fundamental in the work of the ILC, as illustrated by the fact that it appears at the very beginning of the commentary:

“The emphasis is on the secondary rules of State Responsibility: that is to say the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The Articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of primary rules, whose codification would involve restating most of the substantive customary and conventional international law”<sup>185</sup>

Despite this clear description of the distinction between primary and secondary rules, however, a reading of the Articles themselves highlight its difficult application by the ILC itself.

Indeed, it seems difficult to affirm that the Articles just deal with secondary norms. For example, Article 16, on the aid or assistance in the commission of an internationally wrongful act, is clearly conceived as giving rise to a distinct obligation than the one not to breach the initial obligation by the state. This is clear from the commentary to this article, which explicitly states, not only that there is an ‘obligation not to aid and assist’, but that the complicit State is not held responsible for the international wrongful act of the main perpetrator, but for the act of aiding and

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<sup>185</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001) at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), p 31.

abetting itself,<sup>186</sup> In this sense, Article 16 is a primary rule, rather than a secondary one.<sup>187</sup>

More generally, it is difficult to categorize the subject-matter of Part II of the Articles, relating to the content of the international responsibility of a state. Whereas it is true that these relate to consequences of wrongful acts, and therefore can be considered to be secondary norms, they also provide in themselves for obligations (cessation and non-repetition,<sup>188</sup> reparation<sup>189</sup>) that can be breached and as such be subjected to secondary norms, which make them to a certain extent primary norms.

This dual nature of Part II means that if the primary/secondary dichotomy had been strictly followed, as a conceptual distinction, rather than as a pragmatic one, as described previously, Part II could technically not have existed at all, the existence of an obligation to repair, or at the very least the scope and extent of that obligation, being left to the content of each individual primary obligation, in the same way that the requirement of fault or damage is left to the primary obligation. To be clear, this would certainly be impractical, and is not the solution we argue for. It is just an illustration of the difficult identification of what really constitutes a primary or a secondary norm, beyond the pragmatic considerations of efficiency. Following this same logic, one can even argue that the rules of attribution could very well have been considered to be part of primary obligations, in the same way that fault or damage was, to the extent that they relate to the violation of the norm. The same holds true of circumstances precluding wrongfulness, to the extent that they affect the initial violation itself, rather than the responsibility of the state.<sup>190</sup>

### 3.3.2 The conceptual limits and confusion of the dichotomy

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<sup>186</sup> *Ibid*, p 66.

<sup>187</sup> B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *Revue Belge de Droit International* 370.

<sup>188</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), Article 30.

<sup>189</sup> *Ibid*, Article 31.

<sup>190</sup> E David, 'Primary and Secondary Rules' in J Crawford et al. (ed), *The Law of International Responsibility* (Oxford University Press, 2010) 27, 29.

The problem that the above examples highlight is the unclear, if not inexistent, criteria for establishing what part of responsibility actually should be left to primary rules entirely (fault, requirement of damage) and what should not (attribution, reparations). According to the way the ILC has applied its distinction, one can easily argue that everything is primary, or everything is secondary. The former argument would fit with the traditional private law approach to the legal order, as described previously, whereby states consent to all the rules that apply to them, including those relating to their own responsibility. The latter argument would fit in a more Hartian model, whereby the primary rules are the strict rules of conduct and all the rules of responsibility should be considered as secondary rules of adjudication.<sup>191</sup> But neither conclusion is fully compatible with the current ILC framework.

In fact, what becomes apparent is that the dichotomy between primary and secondary rules was adopted for essentially pragmatic reasons rather than conceptual ones. This is confirmed by the drafting process and the discussions that took place at the ILC. Indeed, this allowed the ILC to circumscribe its work, which had reached an impasse, most notably on the question of injuries to aliens and their property, by excluding from its purview the question of the sources of the obligations, only looking at the determination of the breach of an obligation and the consequences of such a breach.<sup>192</sup> The positive consequence of such an approach at the ILC must therefore be recognized, if only because it enabled the Commission to move forward and ultimately conclude its work on its Articles on State Responsibility. It remains, however, that this dichotomy can be questioned in its conceptual relevance.

For one, it appears that the dichotomy, beyond its initial definition was not meant as being conceptual at all and masked an entirely different criteria for inclusion in the ILC Articles, that of generality: ‘what defines the scope of the articles is not their “secondary” status but their generality: the articles represent those areas where the ILC could identify and reach consensus on general propositions that can be applied

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<sup>191</sup> J D’Aspremont, ‘Hart et le Positivisme Post-moderne en Droit International’ (2009) 113 *Revue Générale de Droit International Public* 635.

<sup>192</sup> E David, ‘Primary and Secondary Rules’ in J Crawford et al. (ed), *The Law of International Responsibility* (Oxford University Press, 2010) 27.

more or less comprehensively across the entire range of international law'.<sup>193</sup> Crawford noted on this point: 'to some extent the classification of a rule of responsibility as secondary or not is linked to its generality. The articles are aimed at specifying certain *general* rules concerning the existence or consequences of the breach of an international obligation'.<sup>194</sup>

Crawford also confirms the fundamentally pragmatic approach adopted and the rejection of any conceptual objective: 'it results from this analysis that the distinction between primary obligations and secondary rules of responsibility is to some extent a functional one, related to the development of international law rather than to any logical necessity. Since the ILC is not engaged in posterior analytics, that does not seem to be much of a criticism.'<sup>195</sup>

As said previously, the ILC's pragmatism, as made explicit by Crawford, is certainly laudable as allowing the Commission to finish its work on the Articles. It does however beg the question of why, if it is not that essential, "burden" the theoretical debate on responsibility with the primary/secondary dichotomy at all? Indeed, it creates a certain number of unnecessary confusions.

For one, it creates an illusion of a chronological evaluation between the two types of rules.<sup>196</sup> The primary rules being somewhat the main source of obligations and the secondary rules a subsidiary set of principles and source of obligations. But the operation of establishing the responsibility of a state is both more complex and more holistic. The operation of attribution implies some consideration of the content of the obligation,<sup>197</sup> just as the drafting of the primary obligation will affect the requirements of reparation. There is an interaction between the two sets of rules which, if only semantically, makes the primary/secondary model confusing.

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<sup>193</sup> D Bodansky and J R Crook, 'Introduction and Overview,' (2002) 96 *American Journal of International Law* 773, 780-781.

<sup>194</sup> J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *American Journal of International Law* 874, 879 (emphasis in the original).

<sup>195</sup> *Ibid*, at 879.

<sup>196</sup> N Bobbio, 'Nouvelles réflexions sur les normes primaires et secondaires' in C Perelman (sous la direction de) *La règle de droit* (Bruylant, 1971) 104.

<sup>197</sup> See for example, J d'Aspremont, 'Le tyrannicide en droit international', in C Tomuschat, E Lagrange and S Oeter (eds.), *The Right to Life* (Martinus Nijhoff, 2010) 287.

Second, the relation between the primary/secondary distinction on the one hand and the notion of *lex specialis*, on the other, is complex and somewhat confusing. As things stand, whereas primary rules are out of the ILC Articles, and can as such be subject to agreement by states, also the category of *lex specialis* allows for the possibility that States apply different rules than those that the ILC provide for. Once we establish that the ILC arbitrarily labeled certain rules of responsibility as primary rules, such as the question of fault, we are left with the question what is the distinctive nature of *lex specialis*, which applies only to those rules of responsibility that the ILC considered, but is not helpful for all other relevant rules of responsibility that might have been left out for entirely pragmatic reasons. Crawford, actually confirms the relative nature of the distinction: ‘The distinction between primary and secondary obligations was, and is, somewhat relative. A particular rule of conduct might contain its own special rule of attribution or its own rule about remedies. In such a case, there would be little point in arguing about questions of classification. The rule would be applied and it would normally be treated as a *lex specialis*, that is, as excluding the general rule.’<sup>198</sup>

### 3.3.3 Shifting away from the dichotomy

As a result of the uncertainty of the conceptual foundation of the dichotomy for the ILC, we are left with the question of the usefulness of keeping it or trying to save it for the purposes of our project.

One could adopt the reasoning behind the dichotomy in the work of the ILC, as laid down previously, that of generality. But this is not the nature of our project. We are not the ILC bound by obligations of achieving consensus on generally recognized rules, and we do engage in “analytics”. One could also adopt a clearer Hartian perspective, with on the one hand obligations of conduct<sup>199</sup> (primary norms) and on

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<sup>198</sup> J Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 *American Journal of International Law* 874, 877.

<sup>199</sup> The term of “obligations of conduct” is meant here as the generic term, and not in the specific sense meant by Ago as obligations of means in opposition to obligations of result. See P M Dupuy, ‘Reviewing the Difficulties of Codification : On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999) *European Journal of International Law* 371 and J Combacau, ‘Obligations de résultat et obligations de comportement, quelques questions et pas de réponse’ in *Mélanges offerts à Paul Reuter, le droit international, unité et diversité* (Pedone, 1981) 181.

the other, the rules of enforcement of those norms (secondary norms). This is a sound conceptual foundation, but does not really help us for the goals of our discussion on shared responsibility on identifying rules that distribute responsibility and apportion liability, rather than categorize rules based on their nature.<sup>200</sup>

Simply put, as explained in more detail below,<sup>201</sup> we argue for a holistic and integrated approach, irrespective of any primary/secondary categorization, that looks at both the content of obligations as strictly speaking obligations of conduct, as well as what regime of responsibility can be applied, depending on the public or private interest being protected, therefore shifting the debate from the primary/secondary dichotomy, to a more relevant public/private one. Moreover, we need to consider all the rules of Responsibility, without being held by the ILC framework. The specific arrangements on shared responsibility between states, contained in treaty mechanisms for example, which were formerly either thought to be primary rules or *lex specialis*, depending on whether the ILC included discussion of them or not, can be labeled under a more relevant category of derogatory regimes, in contrast to the general regimes of responsibility that might apply.

### 3.4 The responsibility/liability dichotomy

Outside of the use of the terms responsibility and liability in the context of the ILC as applying to two very different situations, there is a considerable ambiguity in the use of these words, both in the international law literature and in comparative law. Indeed, liability and responsibility are often used interchangeably to address either issues of responsibility *stricto sensu* or issues of reparations.<sup>202</sup>

We would suggest that it would be a useful methodological step to re-introduce a concept of liability in the discussions on responsibility. The term would cover the issues pertaining to reparations in a broad sense.

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<sup>200</sup> In addition, the dichotomy would not be useful in helping us distinguishing these rules between themselves, given that they would all fit in the secondary rules category.

<sup>201</sup> Section 3.3.

<sup>202</sup> See for example, J Noyes and B Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 (2) *Yale Journal of International Law* 225.

Such a re-introduction has both theoretical and practical advantages. First of all, the nature of obligations can have consequences on the scope of responsibility and on the scope of liability that are not necessarily the same. Moreover, from a theoretical perspective, the clear distinction between the two terms allows us to cover two quite distinct aspects. “Responsibility” focuses on the conduct of the wrongdoer. It allows for a different evaluation, depending on the public or private nature of the interest protected by the obligation. Liability focuses more on the injured entity and its right to reparation, in particular compensation, which does not necessarily depend on the character of the initial obligation. As we will further explain below, the operation of principles of shared responsibility may differ significantly between these aspects.

From a practical point of view, it allows us to better describe the reality whereby liability can arise without responsibility having previously been established. This holds first and foremost for liability for non internationally wrongful acts: the principle of joint liability under the Outer Space Treaty is not contingent on a finding of wrongfulness.<sup>203</sup> Following from that, and pushing this logic further, one question that will need to be addressed is whether the concept of liability, as envisioned here, can be extended to cover situations where obligations to compensate arise from other procedures where neither the wrongfulness of the act, nor the responsibility of the compensating entity is considered, such as reparations commissions, unilateral decisions or political agreements.

### 3.5 A new approach to State responsibility: from a unitary regime to differentiated regimes.

In light of the previous developments, the framework that we propose to develop will deal more comprehensively with the variety of aspects identified above. First of all, by accepting to distinguish the public and private dimensions of international responsibility, this framework will move away from a unitary approach towards a differentiated approach to regimes of responsibility, with several differentiated regimes being considered to address the various objectives of international

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<sup>203</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 UNTS 205; M Lachs, *The law of outer space: an experience in contemporary law-making* (Martinus Nijhoff, 2010).

responsibility. Within the differentiated regimes of responsibility, the reasoning would lead us to consider both what the principles and rules are provided in the general regime of responsibility, and what possible derogatory regimes (that would in particular be contained in treaties, but not only<sup>204</sup>) would modify the application of the general regime.<sup>205</sup> Finally, by breaking down the dichotomies between primary and secondary norms, as considered by the ILC, this framework will more clearly allow us to consider the relationship between obligations and responsibility.

These three “steps” of State Responsibility (obligations, general regime and special regime) will have to be viewed in light of the public/private nature of the obligation and the regime of responsibility.

In relation to the obligation, one consequence of the proposed framework of analysis is that the nature of the obligation may determine the regime of responsibility. The nature of the obligation can be approached from two angles: the hierarchy of norms and the addressees of the norm. For one, in relation to the hierarchy of norms, the consensual model of international law, whereby all obligations have equal footing is, as previously argued,<sup>206</sup> challenged by recent trends of the international legal order. Indeed, there is an increased differentiation of norms in the international legal order, with the paradigmatic example being the development of norms of *jus cogens*, that has in turn opened a more general discussion on a possible hierarchy of norms, with at the top of the hierarchy a series of constitutional principles,<sup>207</sup> such as certain human rights obligations.<sup>208</sup> In this sense, it is perfectly conceivable that an obligation can be drafted as having *per se* a public or a private objective, triggering the application of a particular regime of responsibility that comes to insure the protection of that objective.

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<sup>204</sup> It is also conceivable that such regimes emerge by particular custom, at the regional level for example. B Simma and D Pulkowski, ‘Leges Speciales and Self-Contained Regimes’ in J Crawford et al. (ed) *The Law of International Responsibility* (Oxford University Press, 2010) 139, 140.

<sup>205</sup> At this stage, we do not take a definitive position on the order in which these need to be looked at. The order in which the regimes should be considered will depend, among other things, on the approach to the international legal order from the angle of unity, or the angle of fragmentation. *Ibid*, at 146-147.

<sup>206</sup> *Supra*, Section 4.1.

<sup>207</sup> S Kadelbach and T Kleinlein, ‘International Law: a Constitution for Mankind? : an Attempt at a Re-appraisal with an Analysis of Constitutional Principles’ (2007) 50 *German Yearbook of International Law* 303 and J Klabbers et al., *The constitutionalization of international law?* (Oxford University Press 2009).

<sup>208</sup> L Caplan, ‘State Immunity, Human Rights and "jus cogens" : a Critique of the Normative Hierarchy Theory’ (2003) 97 *ASIL* 741.

Second, in relation to the addressees of the obligation, obligations will vary from being bilateral, to multilateral, to *erga omnes*, which might put them on different places on the public/private scale. For example, the obligations contained in a bilateral trade agreement will not necessarily “carry” the same regime of responsibility and the same consequences in terms of possible shared responsibility as a multilateral treaty on the conservation of fish stocks. The project will have to address the possibility of classifying obligations according to their nature and how this might affect the shared responsibility for their breach.<sup>209</sup>

More generally, it is however likely that the nature of the obligation itself will often not inform us on the applicable regime of responsibility and the possibility of implementing shared responsibility. In those situations the obligation will be framed neutrally, in terms of its addressees and the protected interest, and it will be the consequences of its breach that triggers one or more regimes of responsibility with different rules, depending on the interest protected by the regime itself. This is closer to the way the law of responsibility is applied in any legal system, where different regimes (tort, criminal, administrative, etc) may apply to the same violation of an obligation with their distinct set of rules in terms of procedure and invocation, as considered below.<sup>210</sup> Such a framework will therefore allow us to imagine different rules for different institutions, without having necessarily to choose between them in an institutional void and in a Manichean way, as the unitary approach to international State responsibility imposes on us today.

In relation to the regimes of responsibility themselves, the public/private interest that is protected will condition the requirements for responsibility. Two typical examples can be given at this stage: the question of fault and the role of injury. It should however be noted that it can also affect other possible conditions for establishing

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<sup>209</sup> Incidentally, this will also challenge the idea that the source of the obligation is irrelevant for international law. Indeed, the violation of a treaty obligation of a bilateral nature could lead to different consequences than the violation of a customary norm of *jus cogens*. In the same way, the relationship between *erga omnes partes* treaty obligations and *erga omnes* customary obligations, even if they can overlap in cases of near to universal ratification of a given treaty, will need to be explored in light of the public or private nature of the interest being protected. On the different “types” of *erga omnes* obligations, see *infra*.

<sup>210</sup> Section 4.2.

responsibility or allocating loss, such as causation, effective control or geographical proximity.

First of all, it is conceivable that the nature of the conduct that triggers responsibility be different depending on the protected interest, allowing for a gradation between fault and objective responsibility. The project will provide a study of the various foundations for responsibility and their relationship to the goal to be achieved. For example, a utilitarian approach could justify that the more crucial the interest is and the consequences of a breach are (in the case of nuclear activities for example) the less fault should play a role. On the other hand, a more Kantian approach could suggest that moral blame should only rest on the State that had an intent to commit the breach, so as not to attach the stigma of establishing responsibility too widely.<sup>211</sup>

The second example is that of injury. As discussed previously,<sup>212</sup> injury has been removed from the conditions of establishing responsibility. However, also in this respect distinctions may need to be made. Indeed, it makes more sense in a case of breach of a bilateral treaty obligation, which is therefore of a private (contract) law nature, that a factor of responsibility be the injury suffered by the direct beneficiary of the obligation. On the other hand, in more public law-oriented situations, the interest protected by the existence of the norm requires that the conduct in itself give rise to responsibility, thus reducing the importance of injury as a component.<sup>213</sup>

An important consideration in relation to the regimes of responsibility is the interaction between the general regimes and the derogatory regimes, ie to what extent is a derogation possible. The question is not a new one. In relation to primary norms, the Vienna Convention on the Law of Treaties provides a typical example by stating that a treaty cannot derogate from a *jus cogens* norm.<sup>214</sup> Moreover, treaties often provide for possible derogations and the limits of these derogations.<sup>215</sup> Within the law

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<sup>211</sup> For the implications on Shared Responsibility, see *infra*, section 4.

<sup>212</sup> *Supra*, section 3.2.1.2.

<sup>213</sup> For the implications on Shared Responsibility, see *infra* section 4.

<sup>214</sup> Article 53, 1969 Vienna Convention on the Law of Treaties.

<sup>215</sup> See for example 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, article 11, which provides that any special agreement should not “derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention”.

of State Responsibility, the question is equally present, as illustrated by discussions on the relationship between *lex generalis* and *lex specialis*. The ILC Draft Articles enshrine the principle of *lex specialis derogat legi generali* in its Article 55 according to which the articles do not apply if the issues of responsibility ‘are governed by special rules of international law’. The possibility of the existence of *lex specialis* has given rise to some discussions, both on the conceptual level in relation to the unity of the international legal order,<sup>216</sup> and on the technical one, in relation to the exact identification of a special rule. Moreover, numerous studies have discussed special regimes.<sup>217</sup>

What is missing, and what the SHARES project will provide, is a more systematic discussion on the relationship between the general regime and the derogatory regimes, especially in light of the public or private nature of the interest protected by both the obligation and the regime. The Commentary to Article 55 gives an example, by suggesting that “States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law”.<sup>218</sup> What our differentiated model suggests is that it is not only the nature of the obligation, as discussed previously, but also the objective of the regime of responsibility that conditions possible derogations. This certainly has consequences for Shared Responsibility situations. It will have to be determined whether certain entities can derogate from certain rules in the distribution of responsibility among them in case of damage, based on the interest protected.

In sum, we argue that we need to recognize the wide variety of regimes for shared responsibility, between such areas as military operations, refugee law, and environmental law. Each of such areas has their own set of (primary) obligations that is relevant to questions of shared responsibility, and has its own private and public law dimensions, and construing shared responsibility in terms of differentiated

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<sup>216</sup> A Marschik, ‘Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System’ (1998) 9 *European Journal of International Law* 212.

<sup>217</sup> For a recent series of examples discussing, among others, the human Rights systems, the WTO and the EU, see J Crawford et al. (ed), *The Law of International Responsibility* (Oxford University Press, 2010) section 3 at 725.

<sup>218</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), Commentary to Article 55, at 140.

regimes seems inevitable. Yet, we also will need to assess and interpret such differentiated regimes in the light of general international law and reflect on the coherence that does, and perhaps should, exist between the differentiated regimes.

#### **4. Principles and processes of Shared Responsibility**

The project will revisit the principles and processes of shared responsibility through the lens of the conceptual framework that has been proposed. The project assumes, in light of the deficiencies identified in section 2 and the need to connect to the fundamental developments that we have sketched in section 3, that principles of shared responsibility should be considered to better cover the reality of situations where multiple actors cause injury. We distinguish two aspects: substantive aspects that concern the allocation of responsibility between multiple wrongdoing states, as well as between wrongdoing states and injured states (section 4.1), and procedural aspects that will arise in (quasi-)judicial proceedings (section 4.2).

##### **4.1. Substantive Aspects**

The main question to be answered is whether principles of responsibility and of liability can be identified or developed that are better suited to deal with situations of shared responsibility than the principle of independent responsibility examined above.<sup>219</sup> The question in this context no doubt is: on the basis of what criteria can responsibility be allocated between multiple parties.

A common approach to this question is that of “joint and several responsibility”. This principle has been advanced in scholarship,<sup>220</sup> is contained in some treaties, and has been considered in some case-law. For example, the Seabed Authority affirmed the applicability of this principle under the Law of the Sea Convention: ‘Joint and several liability arises where different entities have contributed to the same damage so that

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<sup>219</sup> *Supra*, section 2.1.

<sup>220</sup> For example, C Chinkin, ‘The Continuing Occupation? Issues of Joint and Several Liability and Effective Control’ in P Shiner and A Williams (ed), *The Iraq War and International Law* (Hart Publishing, 2008) and J Noyes and B Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 (2) *Yale Journal of International Law* 225.

full reparation can be claimed from all or any of them.’<sup>221</sup> What is meant by this expression is that the victim can require the full amount of reparations from one of the responsible states, which can in turn require compensation from the other responsible states which might have contributed to the damage.

The principle of joint and several responsibility is well-known at the domestic level, though it is to be noted that the Principles of European Tort Law have adopted a different terminology. Indeed, the drafters of these principles project believed that the expression of “joint and several” might be misleading because “it may suggest that the tortfeasors have to be sued together and secondly because of the association with ‘joint tortfeasors’ who form only a part of those exposed to ‘joint and several liability’.”<sup>222</sup> They therefore consider that the expression of “solidary liability”<sup>223</sup> is more appropriate. This covers a situation where the damage can be attributable to two or more entities. The expression of “several” (or “proportionate”) responsibility remains, and allows for the apportionment of the payment of damages between the responsible entities and where the injured party can only claim the damages specifically caused by any given State.<sup>224</sup>

Despite the obvious caution that is needed from borrowing from domestic analogies, we believe that the European Principles show that several procedural and conceptual considerations should be kept apart, especially given the diversity of possible practical situations. Indeed, as the Principles of European Tort Law show, two different sets of questions are considered: the first ones relating to the relationship between the tortfeasors and the victim and the second one relating to the relationship between the tortfeasors. We will follow this distinction for the purposes of discussing the implementation of shared responsibility and these two aspects will be discussed separately in section 4.1.1 and 4.1.2.

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<sup>221</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, No. 17, ITLOS, 1 February 2011, par 201

<sup>222</sup> Unification of Tort Law: Multiple Tortfeasors, Rogers (ed.), at 272.

<sup>223</sup> It should be noted that the Principles seem to use the expression of “liability” and “responsibility” interchangeably.

<sup>224</sup> Principles on European Tort Law, Article 9:101(3).

#### 4.1.1. The relationship between the victim State and the responsible States

A core objective is to determine against which state(s) a claim can be brought. In order to answer this question, several inter-related considerations will need to be addressed.

The first consideration relates to the *nature of the wrongful act(s)*. Do different principles of shared responsibility apply depending on whether the action is concerted or independent?<sup>225</sup> In situations of concerted action, the question is whether responsibility flows from the participation in the common enterprise or the individual attribution of the specific act. The second option seems to be the accepted one, as stated previously.<sup>226</sup> We will explore whether, and if so under what conditions, the common participation in a collective endeavor should be the criterion for being able to raise a claim against a State, even if, by applying the ILC principles, the conduct that led to the wrongful act is attributable to another State.<sup>227</sup> Another question arising in this context is whether we can shift the reasoning from the attribution of the specific act to a form of implied consent to the consequences of participation in a joint enterprise, the foundations of which would be distinct that the traditional model of individual attribution.

The answer to this question need not be unitary. Depending on the interest protected by the applicable regime of responsibility, the answer might vary. Indeed, because such an approach would imply that a State might be responsible, even though no “fault” on his part exists, it will need to be determined, depending on the *telos* of the regime of responsibility under consideration, whether it is desirable to require individualized fault for the determination of responsibility, or whether some form of ‘collective responsibility’ is acceptable, which will in turn factor in moral considerations, as illustrated earlier.<sup>228</sup> This will also invite some discussion of the

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<sup>225</sup> See for the difference between the two types of actions. J E Noyes and B D Smith, ‘State Responsibility and the Principle of Joint and Several Liability’ (1988) 13 (2) *Yale Journal of International Law* 225, at 228.

<sup>226</sup> *Supra*, section 2.1.

<sup>227</sup> One way of making this work under the ICL articles, would be to apply article 11 on the adoption of a conduct as his own by a State. Participation in a common enterprise would involve implied consent to adopting the conduct theoretically attributable to another State.

<sup>228</sup> *Supra*, Section 4.4.

relevance of concepts of joint enterprise as developed in other fields of international law, most notably international criminal law.<sup>229</sup>

In contrast, in situations of *cumulative responsibility*, where states and/or international organizations act independently and where there is no concerted action, it would seem difficult to adopt a principle of implied consent to make a state responsible for another state's conduct. In such situations, the traditional model of attribution might be more adequate and allow for the development of principles of multiple attribution based on independent acts, with as a starting point the principle contained in Article 47 of the ILC Articles.

The second consideration is that of the *qualification of the responsibility*. States and international organizations can be responsible on a variety of bases, including attribution of the wrongful act, aiding and abetting, or even duty to prevent, as was the case in the *Genocide* case. What are the substantive procedural rules that might link these types of responsibilities and to what extent are the procedures against both states possible? For example, how is responsibility allocated between the 'primary' responsible state and the aiding and abetting state? How does one evaluate causation in such situations?

Finally, as a third consideration, the project will explore the consequences of certain categories of collective ('shared') obligations, which therefore relate to the *nature of the obligation*. Seen from the point of view of the injured state, the collective dimension of the obligation comes to the fore. If a state commits genocide against another state, and other states may have been in a position to take action to prevent this genocide, the question arises against whom can the victim-state make a claim for the non-prevention? One way of dealing with this, is to devise a series of allocation principles to identify the state or states that bear the greatest burden for dealing with such a situation. We will consider such criteria in the course of the project.

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<sup>229</sup> M Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise' in S Darcy and J Powderly (ed), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 2010), 184. See more generally, D Jacobs, 'Shared Responsibility in International Law: possible lessons from International Criminal Law' University of Amsterdam, ACIL Working Paper, forthcoming.

But the question will also be considered of whether that really encapsulates the conceptual foundations of such collective obligations. Indeed, this obligation is more than just another obligation. It represents a recognition of a form of primitive social contract at the international level whereby the international community, as a reified entity owes a sort of sovereign duty to protect its subjects, in the same way that a State must protect its citizens against crime. In this sense, the duty is truly a **shared obligation** and owed by the international community as a whole, and because there does not exist such a legal entity that can be brought before a court, by all states composing that community, irrespective of their special relationship to the injured State.

In light of this analysis, the project will explore alternative ways of dealing with these kinds of obligations which do not fit within the logic of traditional State Responsibility, even conceived through the public/private dichotomy. One possible approach is to consider that the UN, as the most advanced, if imperfect, embodiment of the international community, be the sole bearer of such obligations, to the extent that a breach of these obligations falls within the scope of Article 39 of the Charter, with a collective corresponding duty to repair the consequences of the violation of the duty – an approach that would be related to the emerging literature on the possible obligation of the Council to act in R2P situations.<sup>230</sup>

The above questions are independent of (if related) to the extent of the claim of the injured party, once the principle of responsibility has been established. This is where we move on to issues of liability. What can an injured party claim against a specific state or organization? The idea behind joint liability would be that an injured party can claim the whole damages against a state or organization, even if that part is only one of a multiplicity of states. A second possibility would be that of proportionate liability, when a claim could only be brought for the damage attributable to a given state.

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<sup>230</sup> A Peters, 'R2P and the P5: The Obligation to Give Reasons for a Veto', in J Hoffmann & A Nollkaemper, *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, 2011, forthcoming).

The first option could seem like a natural consequence when responsibility is based, as considered above, on accepted participation in a common endeavor. But it is not entirely impossible to imagine that, although a state might be held responsible for a wrongful act, based on its contribution to a shared project, it might not be liable to compensate for whole or even a large part of the damage. In a public law approach to the law of responsibility, the simple acknowledgment of responsibility could be seen as a symbolic enough gesture to satisfy the requirements of the sanctity of the international legal order.<sup>231</sup>

The second option raises different questions, mostly linked to attributability and causation. But this will also depend on the method of apportionment, which could be based on fault or based on a predetermined apportionment, based on the area of law under consideration and the nature of the collective endeavor.

#### 4.1.2. The relationship between the responsible States

Finally, there remains the question of the relationship between the contributing states. This is where “several” liability may come into play. As mentioned previously, “several liability” entails, in its general understanding, that an entity will only be liable for what is attributable to it, and can therefore claim from other responsible entities in the event that it had to compensate fully for the damage. Obviously, therefore, the question of several liability only arises when one adopts a system of “solidary” liability, as defined in the European Principles on Tort Law, and it raises similar questions as in the case of proportionate responsibility in relation to causation, and the decisive criteria for apportionment.

The question is whether, outside specific regimes such as the Law of the Sea Convention, international law knows such a principle of ‘several’ liability that allows for claims between responsible states. In theory we could propose an approach where there is in fact no apportionment between the contributing parties themselves. But this

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<sup>231</sup> One could of course contest this conceptually, arguing that without an actual “sanction” the deterrent purpose loses of its potency, and practically, arguing that an injured party might be unlikely to make a claim if no compensation is envisioned. That is certainly true, but one should not however underestimate the symbolic nature of international legal proceedings.

would be hard to defend conceptually: why should a state which has not fully contributed to the damage, but has nevertheless paid full compensation, be prevented from claiming from another state which has committed a wrongful act having caused part of the damage?<sup>232</sup> This would require some kind of “procedural luck” concept, according to which the first to be brought to court should bear the brunt of the reparations.

One could also argue that once full compensation has been paid to the injured party, that puts an end to one procedure, and that the payment of damages results in a transfer of the injured parties’ rights to the contributing state that has compensated. In this sense, this mechanism would be similar to the situation where a person A owes a person B some money. Enters person C who pays off the debt, which therefore has as a consequence that this third person is substituted in B’s rights in relation to A. If we do accept this analysis, the term of “several” itself, if useful from a descriptive point of view, becomes in fact inadequate from a procedural point of view. In effect, once a state has compensated the injured party fully, the whole process starts over, and the paying contributing state becomes the injured party in relation to other states and may trigger their responsibility and liability in the fashion described previously.

Three things need to be made clear with this alternative approach. First of all, the origin for the responsibility of the contributing state which has not yet paid any reparations is therefore the violation of the initial primary obligation. Second of all, in this case the rules of responsibility will be the same, but the rules of liability need not necessarily be the same. In fact, in the interests of judicial economy it might even be better that the solidary liability of the first instance become proportionate liability in subsequent instances. Subsequently, and thirdly, it will be for the respondent State in this new (and autonomous) phase of the proceedings, i.e, the state that contributed to the damages but whose responsibility had not been sought, to invoke the contributing act of the applicant State, i.e, the state that had to pay compensation to the initial injured state, in order to reduce the quantum of damages.

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<sup>232</sup> The Principles of European Tort Law do mention an interesting scenario where, if one contributing party cannot be made to pay, his share is allocated to the other responsible parties in proportion to their responsibility (see Annex 1, 9:102, §4). This is therefore one case where some contributing parties may pay more than what they should.

Other approaches will have to be considered, and their comparative conceptual and normative weaknesses assessed.

#### 4.2.Procedural aspects

In addition to the more substantive principles or shared responsibility discussed above, also certain aspects of the procedure and processes of shared responsibility, in particular relating to procedures before international courts.

##### 4.2.1. Bilateral versus multilateral dispute settlement mechanisms

The principles of individual responsibility are accompanied by processes for implementation and enforcement that match the characteristics of individual responsibility. However, in the increasingly complex character of international relations, ‘legal disputes between States are rarely purely bilateral’.<sup>233</sup> The present system of international dispute settlement is hardly designed to deal with multilateral disputes.<sup>234</sup> Procedures may not be able to capture all parties involved and may not do justice to the complexity of a context consisting of multiple responsible actors.

Given that international dispute settlement mechanisms are based on the consent of States, the mere fact that one State involved has not consented to the judicial process may suffice to exclude any case of shared responsibility from judicial scrutiny. Likewise, if one of the wrongdoing actors happens to be an international organization, questions of shared responsibility will be deemed inadmissible before most international judicial bodies given that acts of international organizations are not judiciable before them.

For instance, after the beginning of the bombardment of Yugoslavia by the NATO military alliance in 1999, the dispute as a whole was treated at various political levels,

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<sup>233</sup> Certain Phosphate Lands in Nauru (*Nauru v Australia*), Separate Opinion Judge Shahabuddeen, I.C.J. Reports 1992, p. 270.

<sup>234</sup> L. Fidler-Damrosch, ‘Multilateral Disputes; in: L. Fidler-Damrosch (ed) *The International Court of Justice at a Crossroads* (Hotei Publishing, 1987) 376-400.

including the United Nations Security Council, as a dispute between Yugoslavia and NATO or as a dispute between Yugoslavia and the member states of NATO. A dispute in legal terms only arose after individualization of disputes between Yugoslavia and each of the states.<sup>235</sup> The question is what the consequences are for the collective context in which the attacks originated.

The bilateral nature of dispute settlement proceedings is in particular unsatisfactory for two reasons. On the one hand, if a complex dispute is, in a procedural sense, brought back to a bilateral dispute, it may inevitably have consequences for the non-participating states. Reisman noted that ‘as interaction increases, more bilateral disputes will have peripheral effects’.<sup>236</sup> A possible determination of the liability of the first state might entail the effective determination of the liability of the other.<sup>237</sup>

On the other hand, the absence of potentially co-responsible parties may adversely affect the interests of a respondent, ‘both by its inability to obtain needed evidence and by the differential levels of obligation that could be created when some but not all of the involved states are bound by the Court’s judgment’.<sup>238</sup>

Developing the international legal regime in a direction where it can better deal with questions of shared responsibility therefore does not only require adjustment of principles but also of processes of responsibility.

Thought should in this sense be given to the possibility of revising procedures for dispute settlement to properly take into account the collective context. This revision should deal with two categories of situations as described in the previous paragraphs:

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<sup>235</sup> Yugoslavia instituted proceedings before the ICJ against 10 NATO member states; these were all NATO member states that had recognized the ICJ’s compulsory jurisdiction. See eg *Legality of Use of Force (Yugoslavia v Spain)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 761, *Legality of Use of Force (Serbia and Montenegro v United Kingdom)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 826, *Legality of Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 916.

<sup>236</sup> M W Reisman, *Nullity and Revision. The review and enforcement of International Judgments and Awards* (Cambridge University Press, 1974) 331-332.

<sup>237</sup> *Certain Phosphate Lands in Nauru, (Nauru v Australia)*, Dissenting Opinion Judge Schwebel, ICJ, Reports 1992, p. 329; *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 19.

<sup>238</sup> Fidler-Damrosch *supra* n 209, at 391.

how to promote multiparty proceedings and how to deal with the absence of some contributing entities to the proceedings.

First of all, what procedures should be put in place to maximize the most comprehensive participation in the proceedings of all relevant parties? The answer depends subsidiarily on who has the obligation to ensure that this happens. From the point of view of an international court, in particular the ICJ, this may involve consideration of joinder of procedures, granting courts the power to add parties to a procedure and powers to order production of evidence.

Another avenue to explore is that the applicant State itself have a certain duty to bring the relevant States before the Court. This could of course not be an absolute duty. Indeed, in addition to jurisdictional impediments, such as the absence of consent to the jurisdiction of the Court by a State, there could be some practical obstacles, such as the availability of evidence, that will compel a State to bring a claim against only one contributing State. But in principle, acknowledging such a duty could be symbolically important in recognizing that the reparation of the injured party is but one aspect of proceedings, and that judicial economy and more general concepts of accountability are also relevant and the applicant State must also contribute to their success.

Second, how should the Court deal with the absence of a party to the proceedings, should its involvement not be possible? The main issue that needs to be reconsidered in this respect in relation to the ICJ is the Monetary Gold principle. This principle stems from a particular reading of the case that needs to be revisited. What should be the criteria for excluding jurisdiction? Should it be any consideration of the involvement of a State not-party to the proceedings? Should it only be limited to situations where pronouncements might have legal consequences, in terms of reparations, for example?

#### 4.2.2. Procedural aspects during the proceedings

The research will require some discussion on other issues of procedure that might come into play during the proceedings. Three illustrations can be given here.

First of all, although the project focuses on situations of multiple responsible entities rather than multiple claimants, it should be acknowledged that the latter situation can be affected by the existence of the former. For example, the drafting of Article 46, which relates to multiple claimants,<sup>239</sup> is evidently premised on the idea of independent attribution of responsibility which underlies the ILC framework. Indeed, it mentions “the state” which has committed the wrongful act, rather than “the states”. Interestingly, although not unsurprisingly given the general philosophy of the Articles, this point is not picked up in the commentary, which only says that article 46 enshrines “the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account”.<sup>240</sup> We will therefore explore the consequences of the suggested rules of shared attribution on the operation of article 46, most notably on the question of whether all injured states can claim against all contributing states and on the question of the nature and quantum of the reparations that can be claimed against one or more states by one or more injured states.

Second, the project will explore the use of *presumptions* as a more subtle corrective tool for the implementation of shared responsibility depending on the factual situation, in relation to the burden of proof. Indeed, rather than being framed in strict categories of attribution, certain factual situations might give rise to presumptions that would change the burden of proof. For example, to avoid the difficult above-mentioned discussion on implied consent altogether, a concerted action could give rise to a presumption of attribution of the wrongful act to all participations in the action, with the burden of proof resting on the respondent rather than the application to provide evidence that the act can in fact be attributed to another State.

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<sup>239</sup> Articles on State Responsibility, Article 46: “Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.”

<sup>240</sup> ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), Commentary to Article 46, at 312 §1 at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

Third, we will have to consider the impact of the operation of circumstances precluding wrongfulness in relation to situations of shared responsibility. These provisions are framed in a way that they exclude wrongfulness rather than excusing the conduct and therefore excluding responsibility. How does that affect implementation of principles of multiple attribution, as considered previously? Can several cooperating states rely on the same circumstances, despite their being framed as individual excuses? If one state invokes necessity successfully, does the act suddenly become lawful for all other contributing states? How does a successful invocation affect liability? Should the burden of reparation shift to other contributing states, despite the damage having been factually caused by the state that invoked an excuse?

## **5. Moving Forward: A semantic toolbox of shared responsibility**

The previous sections have highlighted both the technical and conceptual challenges that need to be addressed to comprehensively understand and deal with situations of shared responsibility. This involves revisiting both the nature and diverse goals of international responsibility, and clearly positioning the discussion of Shared Responsibility within this new conceptual framework. However, achieving the goals of the project not only requires conceptual clarity. It also requires semantic clarity. In this sense, this final section proposes a semantic toolbox of SHARES related terms and concepts that will be a point of reference in the course of the project to achieve its systematic understanding of Shared Responsibility.

### **5.1.A typology of Shared Responsibility**

The examples given in the introductory section, and all through the paper, show that questions of shared responsibility may arise in a wide variety of situations and involve a number of different modalities. It is therefore helpful to provide a preliminary typology, which transcends the casuistics of the diversity of possible situations. While the concept of 'shared responsibility' is at the heart of this typology and indeed is the concept that is the primary concern of SHARES, we will examine, and preliminarily define sub-categories, such as Joint Responsibility and Shared Accountability.

### 5.1.1. Shared Responsibility

We use the term “shared responsibility” to denote the umbrella concept covering the situations under consideration in SHARES. It covers, in a broad sense all situations dealing with allocation of *ex post facto* responsibility and apportionment of loss among multiple entities that contribute to an injury arising from an internationally wrongful act. Shared responsibility covers situations of formal international responsibility, i.e, shared responsibility *stricto sensu* or joint responsibility as defined below, but also may give rise to the involvement of mechanisms that cannot make formal determinations of responsibility, i.e shared accountability, as defined below.<sup>241</sup>

### 5.1.2. Shared responsibility *strictu sensu* (or: joint responsibility)

The primary concern of SHARES is the question how responsibility for injurious consequences is to be shared *ex post facto*. To refer to such situations of shared responsibility *stricto sensu* in the meaning of the ILC articles, we use the term “joint responsibility”. Joint responsibility thus arises in all cases where responsibility (in the sense of responsibility for wrongdoing) arises out of the acts of two or more actors that result in a single injury, and is distributed to them separately, rather than resting on them collectively.<sup>242</sup>

We emphasize that, at this stage, the term ‘joint’ is meant to be descriptive and should not be seen as entailing specific legal consequences, in terms of substance or procedure, as would the expression “joint and several responsibility”, as discussed in section 4.1.

Those instances of shared responsibility that arise out of joint action are tentatively qualified as *cooperative responsibility*. This category covers the responsibility of multiple states (and/or international organizations) vis-à-vis third states, but also the distribution of responsibility between such states and/or organizations.

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<sup>241</sup> *Infra*, section 5.1.3.

<sup>242</sup> L May, *Sharing Responsibility* (University of Chicago Press, 1996).

When there is no formalized concerted action, we would adopt the notion of *cumulative responsibility*. This is a broader concept, whereby we recognize the need for the injured party to be able to claim against several entities, but where there is no link between the actions of these entities.

The distinction between these categories stems from the observation that there is a factual difference in consenting to a collective action, and therefore giving thought to possible consequences, on the one hand, and cumulative responsibility, on the other. While the category of cumulative responsibility covers situations which might procedurally be dealt with in a similar fashion as cooperative responsibility, it might also lead to distinct rules, in terms of attribution and presumptions of conduct and consent.

#### 5.1.3. Shared Accountability

Finally, we use the concept of shared accountability to cover a more complex reality whereby a multiplicity of actors is held to account for breach of prior norms, but where this does not involve international responsibility in its technical meaning. Building on theories of accountability and its relation to justice that go beyond the 'single proceedings model', a concept of shared accountability will better help to comprehend the complex nature of the international legal order, as discussed in section 3.1 and the corresponding changing nature of international responsibility, as discussed in the remainder of section 3.

This would cover situations where, in addition to the responsibility of States and international organizations, the 'responsibility' of non-state actors and individuals would be sought. The term is also applicable to 'responsibility' of international organizations under their own internal rules. The term will also allow for the study of different types of responsibilities, both judicial and quasi-judicial, dealing with complementary but distinct aspects of a situation, such as the strict legal responsibility of the State, the criminal and civil liability of the individuals involved, both before national and international tribunals, the issue of the reparations for victims, that could

be dealt with before courts but also before compensation mechanisms and commissions.

Within this concept, would also be included situations where quasi-judicial or political procedures might replace formal judicial procedures because they are the preferred process for ‘policing’ compliance by the actors involved in joint action, and, for international organizations, because of the near impossibility to find a judicial institution to litigate claims against international organizations.

Shared accountability raises a certain number of questions that need to be examined at a later stage. For instance, the question is to what extent can uncoordinated mechanisms (both judicial and non-judicial) be expected to capture comprehensively the reality of a situation, in both its national and international dimensions? To what extent do and can domestic institutions take into account the collective context in which the state is involved? Will the various institutions possess the necessary information to be able to bring together the pieces of the puzzle of shared responsibility, so that it can become clear who is responsible for what?<sup>243</sup>

## 5.2. Related terms and concepts of Shared Responsibility

### 5.2.1. Shared Obligations

As discussed previously,<sup>244</sup> SHARES takes the view that any discussion of shared responsibility must include a discussion of the content and nature of the obligations resting on states, transcending the traditional dichotomy between primary and secondary norms.<sup>245</sup> It is relevant to categorize obligations since some of them, by their very nature, can be collective and therefore be defined as shared obligations, thus, in case two or more actors breach these obligations, it necessarily entails some form of shared responsibility.

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<sup>243</sup> B Kingsbury et al., ‘The Emergence of Global Administrative Law’ (2005) 68 *Law & Contemporary Problems* 15.

<sup>244</sup> *Supra*, section 3.5.

<sup>245</sup> *Supra*, section 3.3.

We define shared obligations as obligations that two or more states (or other actors) jointly owe towards a third party. They also can be labeled as multilateral obligations.<sup>246</sup> Shared obligations can stem from multilateral treaties (eg obligations to conserve fish stocks), bilateral treaties (as in the *Eurotunnel case*)<sup>247</sup> or may exist under customary international law (eg the obligation to protect the *erga omnes* right of self-determination - as in the *Nauru case*).<sup>248</sup>

It should be noted that the fact that an obligation cannot be defined in an *a priori* way as a shared obligation, does not mean that breach of such an obligation by two or more states cannot entail some form of shared responsibility. Shared responsibility can also result from breach of independent obligations that may or may not overlap in substance.<sup>249</sup> However, it may well be that there is a legally relevant distinction between shared responsibility arising out of breach of shared obligations, on the one hand, and out of breach of independent obligations, on the other - this is one of the questions that will be examined more closely at a later stage of SHARES.

It is noted that shared obligations occasionally are referred to in terms of ‘shared responsibility’, as in the case of Principle 21 of the 1972 Stockholm Declaration that confirms the responsibility of all states to prevent transboundary environmental harm, or as in ‘responsibility to protect’.<sup>250</sup> However, for semantic clarity and so as to prevent confusion as to what exactly is being studied, the project will resist as much as possible using the word ‘responsibility’ to describe these obligations.

### 5.2.2. Shared conduct

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<sup>246</sup> J Crawford, ‘Multilateral Rights and Obligations in International Law’, *Recueil des cours*, Volume 319 (2006), 325-482, J Pauwelyn ‘A Typology of Multilateral Obligations: are WTO obligations bilateral or collective in nature?’ (2003) 14 *European Journal of International Law* 907.

<sup>247</sup> Eurotunnel Arbitration (*The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France*) Partial Award 2007.

<sup>248</sup> Certain Phosphate Lands in Nauru (*Nauru v Australia*), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240.

<sup>249</sup> On this aspect, see generally T Broude and Y Shany (eds.), *Multi-Sourced Equivalent Norms in International Law*, (Hart, 2011).

<sup>250</sup> On this very point concerning the semantics of the term “Responsibility to protect” (formed by a bundle of primary obligations), see S Szurek, ‘Responsabilité de Protéger: nature de l’obligation et responsabilité internationale’ in *La responsabilité de protéger: colloque de Nanterre / Société française pour le Droit international* (Pédone, 2007).

A third term relevant to the study of shared responsibility is 'shared conduct'. Shared conduct is conduct that is attributed to two or more actors simultaneously. An example is the omission to protect that in the *Eurotunnel award* was attributed both to France and the United Kingdom.<sup>251</sup> Shared conduct can be an act of a joint organ, or an act arising out of direction or control of one actor over the other actor, without that direction or control in itself being a wrongful act.

Shared conduct that is in breach of an international obligation of both states will by definition result in shared responsibility of these states, and again the *Eurotunnel case* is an example. Moreover, shared conduct might justify developing different rules of attribution, for example based on consent, that move away from the traditional notion of individual attribution.<sup>252</sup>

It should be noted that shared responsibility can also arise from conduct that is not shared, but that separately is in breach of international obligations (whether shared or independent) and that results in a single injury. The *MSS*<sup>253</sup> and *Ilaşcu*<sup>254</sup> decisions of the ECtHR are illustrations of this.

### 5.2.3. Shared attribution

Shared attribution of responsibility arises when responsibility is attributed to several states simultaneously. There could be several bases for shared attribution. The most obvious situation would be where a situation arises out of a shared conduct, as described previously, the natural consequence being that both the act and its consequences be attributed to the states involved. More ambiguous would be the case where different conducts lead to the commission of the same internationally wrongful act. While in certain circumstances, these different conducts could fall under different types of responsibility (aiding and abetting, for example) and therefore be individually attributable, there might be other circumstances where these conducts, while

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<sup>251</sup> Eurotunnel Arbitration (*The Channel Tunnel Group Ltd & France-Manche S.A. v United Kingdom & France*) Partial Award 2007.

<sup>252</sup> *Supra*, section 4.1.1.

<sup>253</sup> *M.S.S. v Belgium and Greece* [GC] no. 30696/09, ECHR 2011.

<sup>254</sup> *Ilaşcu and Others v Moldova and Russia* [GC] no. 48787/99, ECHR 2004-VII.

distinguishable, may form a coherent whole in the commission of the internationally wrongful act that would justify shared attribution.

In this sense, such notion of shared attribution implies once again that we move away from the current paradigm of individual attribution, and will have consequences in terms of obligations of reparations, with the necessary development of rules of shared liability.<sup>255</sup> The development of principles of shared attribution will also affect the conditions of invocability under Article 47, which only consider at this stage the possibility to claim individually against each contributing state. All these rules will need to be redefined and refined to better address situations of shared responsibility.

#### 5.2.4. Shared Liability

As illustrated throughout the concept paper, one of the key objectives of SHARES will be to address the adequate reparation of injury arising out of situations of shared responsibility. A usual notion will therefore be that of Shared Liability.

It should be recalled, as outlined previously, that “liability” is meant in the context of SHARES, as a distinct notion from responsibility, covering reparation obligations.<sup>256</sup> In this sense, rules pertaining to liability are potentially distinct (and different) from the rules pertaining to responsibility.<sup>257</sup>

Shared Liability would arise when several entities, share a duty to repair an injury. Such Shared Liability would usually arise from the shared attribution of an act or of a shared conduct, but that need not necessarily be the case. Indeed, when several types of proceedings and different layers of actors are involved, as will often be the case,<sup>258</sup> liability may be shared through the operation of a variety of legal tools, such as a court judgment (either international or national), reparations commissions, or political decisions to repair.

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<sup>255</sup> *Infra*, section 5.2.4.

<sup>256</sup> *Supra*, section 3.4.

<sup>257</sup> *Supra*, section 4.1.1.

<sup>258</sup> *Supra*, Section 5.1.3.

Moreover, Shared Liability can take several forms in relation to the particular obligations resting on each responsible entity. It can either be *solidary* should each entity be required to repair the full injury, or *proportionate*, should each entity be required to repair only that part of the injury which it has directly caused.<sup>259</sup>

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<sup>259</sup> *Supra*, section 4.1.1.